

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

Plaintiff,

:

v.

**No. 3: CV-98-0654
(Judge Kosik)**

**HORSEHEAD INDUSTRIES, INC.,
HORSEHEAD RESOURCE DEVELOPMENT
COMPANY, INC.,
VIACOM INTERNATIONAL INC.,
TCIPACIFIC COMMUNICATIONS, INC.,**

:

Defendants.

CONSENT DECREE

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(Electronically Filed)

Defendants.

CONSENT DECREE

I. Background

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint and an amended complaint in this matter pursuant to Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), **42 U.S.C.** §§ 9607, 9613, against Horsehead Industries, Inc., Horsehead Resource Development Company, Inc., Viacom International Inc., and TCI Pacific Communications, Inc. (“Settling Defendants”).

B. The United States in its amended complaint seeks, inter alia: (1) reimbursement of costs incurred on behalf of the United States for response actions at the Palmerton Zinc Pile Superfund Site (“Site”) in Palmerton, Pennsylvania, together with accrued interest; and (2) a declaratory judgment against Settling Defendants on liability for future response costs.

C. The United States further alleges that the United States Department of the Interior (“DOI”), through the National Park Service (“NPS”) and the Fish and Wildlife Service (“FWS”), has undertaken and will undertake response actions and has incurred and will incur response

costs with respect to the Site, for which the United States seeks reimbursement from the Settling Defendants.

D. In accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”) and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the Commonwealth of Pennsylvania (the “Commonwealth”) on August 28, 2001, of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA **has** provided the Commonwealth with an opportunity to participate in such negotiations and be a party to this Consent Decree.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Department of the Interior on October 11, 2000, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in **injury** to the natural resources under Federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

The Site

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658.

G. EPA divided the Site into four Operable Units for purposes of developing and implementing response actions at the Site. Operable Unit 1 primarily includes non-residential land on the north face of Blue Mountain. As described in the Record of Decision for Operable Unit 2, Operable Unit 2 primarily consists of a residue pile containing primarily waste materials **from** zinc processing operations that lies adjacent to the East Plant **and** along the base of Blue Mountain. Operable Unit 3 includes residential areas in and around the Borough of Palmerton,

the village of Aquashicola, and Lower Towamensing Township. (For purposes of this Consent Decree, the terms “Operable Unit 1”, “Operable Unit 2”, and “Operable Unit 3” are defined specifically in Section IV. below.) Operable Unit 4 primarily includes potential contamination in ground and surface waters at the Site.

Operable Unit 1 (“OU1”)

H. In response to a release or a substantial threat of a release of hazardous substances at or from Operable Unit 1, EPA commenced a Remedial investigation and Feasibility Study (“RI/FS”) for OU1 pursuant to 40 C.F.R. § 300.430.

I. EPA completed a RI/FS for OU1 in April 1987.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the RI/FS and of the proposed plan for remedial action for OU1 on May 22, 1987. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action.

K. The decision by EPA on the remedial action to be implemented at OU1 is embodied in a final Record of Decision (“OU1 ROD”), executed on September 4, 1987, on which the Commonwealth has given its concurrence. The OU1 ROD includes a responsiveness summary addressing public comments received by EPA regarding the proposed plan. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

L. EPA entered into a Consent Decree with Zinc Corporation of America (“ZCA”), a division of Horsehead Industries, Inc., for implementation of the remedial activities relating to OU1. Following a public comment period, that Consent Decree (hereinafter “1988 Consent Decree”) was entered by the United States District Court for the Middle District of Pennsylvania on October 18, 1988.

M. Pursuant to the 1988 Consent Decree, ZCA performed certain remedial activities on OU1. On December 10, 1999, EPA issued a Unilateral Administrative Order, EPA Docket No. **III-99-002-DC**, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), to the Settling Defendants directing them to undertake additional remedial activities with respect to OU1.

Operable Unit 2 (“OU2”)

N. In September 1985, EPA entered into an Administrative Order on Consent (“1985 AOC”), EPA Docket No. **III-85-DC**, with Horsehead Industries, Inc. and its division, The New Jersey Zinc Company (collectively, “HII”), and with Gulf & Western, Inc. Under the **terms** of the 1985 AOC, HII agreed to conduct a RI/FS for that portion of the Site comprising the Cinder Bank, which EPA has identified **as** OU2.

O. HII submitted to EPA a RI for OU2 in November 1987 and a FS for OU2 in May 1988. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the RI/FS and of the proposed plan for remedial action for OU2 on May 16, 1988. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action.

P. The decision by EPA on the remedial action to be implemented at OU2 is embodied in a Record of Decision (“OU2 ROD”), executed on June 29, 1988, on which the Commonwealth of Pennsylvania has given its concurrence. The OU2 ROD includes a responsiveness summary addressing public comments received by EPA regarding the proposed plan. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

Q. The remedy selected in the OU2 ROD included predesign **studies** to determine the best methods for controlling or extinguishing the internal fires within portions of the Cinder Bank and treatability studies regarding collection and treatment of surface water run-off from the

Cinder Bank through the use of constructed wetlands and lime treatment. In December 1991, the 1985 AOC was amended to reflect HII's agreement to perform those additional studies.

R. On January 6, 1992, the United States and the Commonwealth of Pennsylvania filed a complaint against Horsehead Industries, Inc. and Horsehead Resource Development Company, Inc., alleging violations of the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act relating to operations and conditions at the Site (the "Multimedia Complaint"). The alleged violations of the Clean Water Act ("CWA") identified in the Multimedia Complaint related primarily to releases **from** outfalls associated with the Cinder **Bank** of contaminants alleged to be in excess of limits contained in National Pollutant Discharge Elimination System ("NPDES") permits issued to HII for those outfalls.

S. On November 13, 1995, the United States District Court for the Middle District of Pennsylvania approved and entered a Consent Decree ("Multimedia Consent Decree") between HII, HRDC, the Pennsylvania Department of Environmental Resources (succeeded by the Pennsylvania Department of Environmental Protection ("PADEP")) and the United States on behalf of EPA resolving the allegations in the Multimedia Complaint. The Multimedia Consent Decree requires that HII design and install pollution reduction technologies ("PRTs") at and in the vicinity of OU2 to address alleged CWA violations. **In** May 1999, EPA and PADEP approved a Revised PRT Work Plan submitted by HII pursuant to the Multimedia Consent Decree. HII is in the process of implementing the Revised PRT Work Plan.

T. Based on an evaluation of the Multimedia Consent Decree, the Revised PRT Work Plan prepared pursuant to the Multimedia Consent Decree, and the work conducted thereunder, EPA issued an Explanation of Significant Differences for OU2 ("OU2 ESD") on August 27, 2002. The OU2 ESD, attached as Appendix **A2** to this Consent Decree, explains

EPA's determination that the activities to be performed under the Multimedia Consent Decree and the Revised PRT Work Plan prepared pursuant to the Multimedia Consent Decree, if successful, should achieve the primary remedial action objectives set forth in the OU2 ROD. Therefore, based on information available as of the issuance of the OU2 ESD, EPA has determined that the actions performed and to be performed under the Multimedia Consent Decree and the Revised PRT Work Plan prepared pursuant to the Multimedia Consent Decree shall constitute the Remedial Action, except for certain operation and maintenance, for OU2.

Operable Unit 3 ("OU3") Removal Resaonse Actions

U. Based primarily on environmental sampling conducted by EPA and its contractors in the Fall of 1991, EPA determined that interim removal activities were required to mitigate immediate threats to human health, welfare, and the environment posed by the presence of elevated levels of metals in residential areas in and around the Borough of Palmerton. From 1994 through 1998, EPA conducted interim removal activities intended to address elevated levels of lead and cadmium in residential soils and house dust. A total of 438 residential properties were sampled and a total of 202 residential properties were addressed during the course of the interim removal action.

Operable Unit 3 ("OU3") Remedial Response Actions

V. Under the ~~terms~~ of the 1985 AOC, Gulf & Western agreed to conduct a RI/FS for certain areas at or in the vicinity of the Site.

W. Paramount Communications Inc. ("Paramount"), corporate successor to Gulf & Western and a corporate predecessor to Settling Defendants Viacom and TCI Pacific, submitted a Draft RI and Risk Assessment Report ("RA") to EPA in 1988. In response to comments from EPA, Paramount submitted revised versions of the RI and RA in 1994. Following review of

those submissions, EPA determined that the RI and RA submitted by Paramount were deficient and assumed responsibility for the RI/FS process.

X. EPA completed an RI in May **1998**, and issued an FS and a Baseline Risk Assessment (“BRA”) in May **2000**, pursuant to 40 C.F.R. § 300.430.

Y. Pursuant to Section **117** of CERCLA, **42 U.S.C. § 9617**, EPA published notice of the completion of the FS and BRA, and of the proposed plan for remedial action on June **5, 2000**, in the Lehigh Times News and the Allentown Morning Call, and held a public meeting on June **28, 2000**. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action. EPA provided an extended period of ninety (90) days for written and oral comments **from** the public on the proposed plan for remedial action.

Z. The decision by EPA on the remedial action to be implemented at OU3 is embodied in a final Record of Decision (“**OU3 ROD**”), executed on October **9, 2001**, on which the Commonwealth has given its concurrence. The OU3 ROD includes EPA’s documentation of changes between the final plan and the proposed plan, **as well as** a responsiveness summary addressing public comments received by EPA regarding the proposed plan. Notice of the final plan was published in accordance with Section **117(b)** of CERCLA.

AA. Based on the information presently available to EPA, EPA believes that the Work contemplated in this Consent Decree will be properly and promptly conducted by the Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

BB. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action for OU1 as set forth in the **OU1 ROD**, the operation and maintenance activities as set forth in the

OU2 O&M Plan, the Remedial Action for OU3 as set forth in the OU3 ROD, and the Work to be performed by the Settling Defendants shall constitute response actions taken or ordered by the President.

CC. The Parties recognize, and the Court by entering this Consent Decree finds, that ~~this~~ Consent Decree ~~has~~ been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of Operable Unit 1, Operable Unit 2, and Operable Unit 3 at the Site and will avoid prolonged and complicated litigation between the Parties, and that ~~this~~ Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

11. Jurisdiction

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). ~~This~~ Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. Parties Bound

2. a. Upon approval by the Bankruptcy Court of ~~HII's~~ and HRDC's entry into this Consent Decree and approval of the Consent Decree by this Court, this Consent Decree shall apply to and be binding upon the United ~~States~~ and upon (i) Settling Defendants ~~and~~ their successors and assigns; and (ii) any subsequently appointed trustee, custodian, or receiver. This Consent Decree shall survive any conversion or dismissal of the Bankruptcy Case.

b. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree. However, in the event that HII and HRDC (i) transfer substantially all of their assets and real property pertaining to the Site through the Bankruptcy Case, HII and HRDC shall seek the consent of the United States to assign all of their **rights** and obligations under **this** Consent Decree to the grantee; or (ii) transfer **any** material asset or real property pertaining to the Site through the Bankruptcy Case, HII and HRDC shall seek the consent of the United States to assign all of their **rights** and obligations under this Consent Decree relating to such assets or real properties to the grantee; and, in either case, the grantee shall be subject to all such **rights** and obligations under this Consent Decree so assigned. The United States shall retain full and unreviewable discretion to consent or object to such an assignment, and may in its sole discretion condition such assignment on the grantee assuming all of HII's and HRDC's outstanding obligations under the Consent Decree so assigned and/or becoming a party to the Consent Decree subject to the jurisdiction of the Court by executing a modification agreement in the form attached as Appendix B2 to this Consent Decree. If (1) the United States consents to HII's and HRDC's request to assign; (2) the grantee complies with any conditions for assignment required by the United States; and (3) the Court approves and enters the modification, the grantee shall be subject to all such obligations so assigned and entitled to such benefits under the Consent Decree as are assigned, and HII and HRDC shall no longer be required to perform the assigned obligations.

3. Settling Defendants shall provide a copy of this Consent Decree to each contractor **hired** to perform the Work (as defined below) required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work and shall

condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree only, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. Definitions

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“Bankruptcy Case” shall mean those bankruptcy cases presently pending in the Bankruptcy Court captioned In re Horsehead Industries, Inc., et al., Case Nos. 02-14024(SMB) through 02-14027(SMB) (**Bankr.** S.D.N.Y.).

“Bankruptcy Court” shall mean the United States Bankruptcy Court for the Southern District of New York.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

“Commonwealth” shall mean the Commonwealth of Pennsylvania.

“Consent Decree” shall ~~mean~~ this Decree, any modifications to the Decree made pursuant to Section XXXI (Modifications), and all appendices attached hereto (listed in Section XXIX).

In the event of conflict between this Decree and any appendix, ~~this~~ Decree shall control.

“Day” shall mean a calendar day unless expressly stated to be a working day. “Working day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing ~~any~~ period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

“Department of the Interior” or “DOI” shall mean the United States Department of the Interior, including the National Park Service and the United States Fish and Wildlife Service, and any successor departments or agencies of the United States.

“DOI Future Response Costs” shall mean all costs, including, but not limited ~~to~~, direct and indirect costs, that DOI incurs after December 31, 2001, in reviewing or developing plans, reports and other items pursuant to ~~this~~ Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor ~~costs~~, travel costs, laboratory costs, the costs incurred pursuant to Sections IX (Access and Institutional Controls) and XV (Emergency Response), provided that such costs are not inconsistent with the NCP. DOI Future Response Costs do not include any ~~costs~~ associated with the Site that are not related to Operable Unit 1, Operable Unit 2, or Operable Unit 3, ~~as~~ those terms are defined by this Consent Decree.

“Duly Authorized Representative” shall mean a person set forth or designated in accordance with the procedures set forth in **40** C.F.R. § 270.1 l(b).

“Effective Date” shall be the effective date of this Consent Decree as provided in Paragraph 144.

“EPA” shall mean the United States Environmental Protection Agency and **any** successor departments or agencies of the United ~~States~~.

“Explanation of Significant Differences for OU2” or “OU2 E S D shall mean the EPA ESD relating to OU2 at the Site, signed on August 27, 2002, by the Director of the Hazardous Site Cleanup Division, EPA Region 111, and all attachments thereto. The OU2 ESD is attached to this Consent Decree as Appendix A2.

“Future Oversight Costs” shall mean that portion of Future Response **Costs** that EPA ~~incurs~~ after December 31, 2001, in monitoring and supervising Settling Defendants’ performance of the Work to determine whether such performance is consistent with the requirements of this Consent Decree, including costs incurred in reviewing plans, reports, and other documents submitted pursuant to this Consent Decree, as well ~~as~~ costs incurred in overseeing implementation of the Work; however, Future Oversight Costs do not include, inter alia: the **costs** incurred by EPA pursuant to Sections VII (Remedy Review), IX (Access and Institutional Controls), XV (Emergency Response), and Paragraph 120 of Section XXI (Work Takeover), or ~~the~~ costs incurred by the United States in enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XIX (Dispute Resolution) **and** all litigation costs. Future Oversight Costs also do not include **any** costs associated with the Site that are not related to Operable Unit 1, Operable Unit 2, or Operable Unit 3, as those terms are defined by this Consent Decree.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs after December 31, 2001, in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to,

payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII (Remedy Review), IX (Access and Institutional Controls), XV (Emergency Response), and Paragraph 120 of Section XXI (Work Takeover), provided that such costs are not inconsistent with the NCP. Future Response Costs do not include DOI Future Response Costs or any costs associated with the Site that are not related to Operable Unit 1, Operable Unit 2, or Operable Unit 3, as those terms are defined by this Consent Decree.

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

“Matters Addressed in this Consent Decree” shall mean all response actions taken and to be taken at Operable Unit 1, Operable Unit 2 and Operable Unit 3, the Work, Retention of Records, Past Response Costs, Future Response Costs, Future Oversight Costs, and DOI Future Response Costs, as those terms are defined in this Consent Decree; all past response actions performed by or on behalf of the United States or the Settling Defendants; and all response costs incurred by the Settling Defendants at or in connection with the Site through December 31, 2001.

“Matters Addressed in this Consent Decree” do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations.

“Multimedia Consent Decree” shall mean the Consent Decree entered by this Court on November 13, 1995, in the matter captioned United States of America and Commonwealth of

Pennsylvania v. Horsehead Resource Development Company, Inc. and Horsehead Industries, Inc., Civil Action No. 92-0008 (M.D. Pa.).

“Municipal Sewage Sludge” shall mean any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage, and may include residue removed, all or in part, during the treatment of wastewater from manufacturing or processing operations, provided that such residue has essentially the same characteristics **as** residue removed during the treatment of domestic sewage.

“Municipal Solid Waste” shall mean household waste and solid waste collected from non-residential sources that is essentially the same as household waste. While the composition of such wastes may vary considerably, municipal solid waste generally is composed of large volumes of non-hazardous substances (*e.g.*, yard waste, food waste, glass, and aluminum) and can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D landfills.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at **40** C.F.R. Part 300, and any amendments thereto.

“Non-Owner Settling Defendants” shall mean Viacom International Inc. and TCI Pacific Communications, Inc.

“Operable Unit 1” or “OU1” shall mean the physical areas remediated, to be remediated, or subject to potential remediation under the Remedial Action for OU1 selected by EPA and set forth in the OU1 ROD and as further described in the OU1 Final Design developed pursuant to Paragraph 13.f. and approved by EPA.

“Operable Unit 2” or “OU2” shall mean the physical materials that comprise the Cinder Bank, as well as areas where work has been or is to be performed pursuant to the Revised PRT Work Plan, as required by the Multimedia Consent Decree, and the OU2 ROD, modified as described in the OU2 ESD. The definition of OU2 for purposes of this Consent Decree shall not include surface water, ground water or surface and subsurface soil or other materials contiguous or non-contiguous to the Cinder Bank, except to the extent that such media are addressed by specific work required pursuant to the Revised PRT Work Plan, as required by the Multimedia Consent Decree, the OU2 ROD, modified as described in the OU2 ESD, and the OU2 O&M Plan.

“Operable Unit 3” or “OU3” shall mean all Residential Properties located within the sampling eligibility boundaries for the Remedial Action for OU3, as those boundaries are specifically described in Section IV of the OU3 ROD, and/or as those boundaries come to exist following adjustments, if any, approved by EPA during implementation of the Remedial Action for OU3. Pursuant to Section IV of the OU3 ROD, any adjustments to the sampling eligibility boundaries shall be made pursuant to criteria determined during Remedial Design for OU3 and approved by EPA, in consultation with PADEP. For purposes of this Consent Decree, OU3 shall not include (1) any land or buildings that are or were associated with the current or former operations of Settling Defendants or their predecessors, including the land and buildings comprising the East and West Plants, or (2) any land containing, or buildings located on, fill material containing hazardous substances that has been transported to such land or buildings from the Cinder Bank or the East or West Plants.

“Operation and Maintenance for OU1” or “OU1 O & M shall mean all activities required to maintain the effectiveness of the OU1 Remedial Action ~~as~~ required under the OU1 Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree.

“Operation and Maintenance for OU2” or “OU2 O&M” shall mean all activities required to maintain the effectiveness of the OU2 Remedial Action as required under the OU2 Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree.

“Operation and Maintenance for OU3” or “OU3 O&M” shall ~~mean~~ all activities required to maintain the effectiveness of the OU3 Remedial Action as required under the OU3 Operation and Maintenance Plan approved or developed by EPA pursuant ~~to~~ this Consent Decree.

“Operation and Maintenance Plan for OU2” or “OU2 O&M Plan” shall mean the document developed pursuant to Paragraph 22 of this Consent Decree and approved by EPA, and any amendments thereto.

“OU1 Supervising Contractor” shall mean the principal contractor retained by the Settling Defendants to supervise and direct the implementation of the Work relating to Operable Unit 1 under this Consent Decree.

“OU3 Supervising Contractor” shall mean the principal contractor retained by the Settling Defendants ~~to~~ supervise and direct the implementation of the Work relating to Operable Unit 3 under this Consent Decree.

“Owner Settling Defendants” shall mean Horsehead Industries, Inc. ~~and~~ Horsehead Resource Development Company, Inc.

“PADEP” shall mean the Pennsylvania Department of Environmental Protection and any successor departments or agencies of the Commonwealth.

“Palmerton Zinc Pile Special Account” shall mean the special account established for use at the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3):

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

“Parties” shall mean the United States and the Settling Defendants.

“Past Response Costs” shall mean all ~~costs~~ not inconsistent with the NCP, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through December 31, 2001, plus Interest on all such costs which ~~has~~ accrued pursuant to 42 U.S.C. § 9607(a) through the Effective Date.

“Performance Standards for OU1” shall mean the cleanup standards and other measures of achievement of the remedial action objectives (set forth on page 6 of the OU1 ROD) for OU1, which standards are to be developed by Settling Defendants and approved by EPA during the Remedial Design for OU1.

“Performance Standards for OU2” shall mean the cleanup standards and other measures of achievement of the remedial action objectives (set forth in Section VII of the OU2 ROD) for OU2, which are required by or developed pursuant to Paragraphs 74-89 of the Multimedia Consent Decree, and any modified or additional standards that may be developed during the implementation of the Multimedia Consent Decree or the OU2 ROD, ~~as~~ modified by the OU2 **ESD**.

“Performance Standards for OU3” shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action for OU3. The Performance Standards for the Contingent Remedy identified in the OU3 ROD include those standards set forth on pages 57-63 of the OU3 ROD (attached to this Consent Decree ~~as~~ Appendix A3), and any modified or

additional standards that are developed by the Settling Defendants and approved by EPA during the Remedial Design for OU3.

“Plaintiff” shall mean the United States.

“RCRA” shall mean the Solid Waste Disposal Act, ~~as~~ amended, 42 U.S.C. §§ 6901 *et seq.* (also known ~~as~~ the Resource Conservation and Recovery Act).

“Record of Decision for OU1” or “OU1 ROD” shall mean the EPA Record of Decision relating to Operable Unit 1 of the Site, signed on September 4, 1987, by the Regional Administrator, EPA Region III, and all attachments thereto. The OU1 ROD is attached to this Consent Decree as Appendix A1.

“Record of Decision for OU2” or “OU2 R O D shall mean the EPA Record of Decision relating to Operable Unit 2 of the Site, signed on June 29, 1988, by the Regional Administrator, EPA Region III, and all attachments thereto.

“Record ~~of~~ Decision for OU3” or “OU3 R O D shall mean the EPA Record of Decision relating to Operable Unit 3 at the Site, signed on October 9, 2001, by the Regional Administrator, EPA Region III, and all attachments thereto. The OU3 ROD is attached to this Consent Decree as Appendix A3.

“Remedial Action for OU1” or “OU1 Remedial Action” shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the OU1 ROD, in accordance with the final OU1 Remedial Design and OU1 Remedial Action Work Plans and any other plans approved by EPA.

“Remedial Action for OU2” or “OU2 Remedial Action” shall mean those activities, except for Operation and Maintenance, to be undertaken by the Owner Settling Defendants to

implement the OU2 ROD, modified ~~as~~ described in the OW2 ESD, in accordance with Paragraphs 74-89 of the Multimedia Consent Decree and any amendments thereto.

“Remedial Action for OU3” or “OU3 Remedial Action” shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the OU3 ROD, in accordance with the final OU3 Remedial Design and OU3 Remedial Action Work Plans and any other plans approved by EPA.

“Remedial Action Work Plan for OU1” shall mean the document developed pursuant to Paragraph 14 of this Consent Decree and approved by EPA, and any amendments thereto.

“Remedial Action Work Plan for OU3” shall mean the document developed pursuant to Paragraph 28 of this Consent Decree and approved by EPA, and any amendments thereto.

“Remedial Design for OU1” or “OU1 Remedial Design” shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Action for OU1 pursuant to ~~the~~ Remedial Design Work Plan for OU1.

“Remedial Design for OU3” or “OU3 Remedial Design” shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Action for OU3 pursuant to the Remedial Design Work Plan for OU3.

“Remedial Design Work Plan for OU1” shall mean the document submitted by Settling Defendants and approved by EPA ~~as~~ set forth in Paragraph 13.a. of ~~this~~ Consent Decree, and any amendments thereto. The Remedial Design Work Plan for OU1 is attached to this Consent Decree ~~as~~ Appendix C1.

“Remedial Design Work Plan for OU3” shall mean the document developed by Settling Defendants and approved by EPA ~~as~~ set forth in Paragraph 27.a. of this Consent Decree, and any

amendments and revisions thereto. The Remedial Design Work Plan for OU3 is attached to this Consent Decree as Appendix C2.

“Residential Property or Properties” shall mean single and multi-family dwellings, apartment complexes, vacant lots in residential areas, schools, daycare centers and playgrounds, parks and greenways, and any other property specifically determined by EPA pursuant to the OU3 ROD to be eligible for sampling in connection with the Remedial Action for OU3.

“Revised PRT Work Plan” shall mean the Work Plan approved by EPA, including any attachments and amendments thereto, for design and installation of pollution reduction technologies at OU2 as required by Paragraphs 74-89 of the Multimedia Consent Decree.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendants” shall mean Horsehead Industries, Inc., Horsehead Resource Development Company, Inc., Viacom International Inc., and TCI Pacific Communications, Inc.

“Site” shall mean the Palmerton Zinc Pile Superfund Site, including Operable Units 1 through 4 as designated by EPA, located in Palmerton, Carbon County, Pennsylvania, and all areas adjacent to or in the vicinity of the Site that have been impacted by releases or threatened releases of hazardous substances at or from the Site.

“United States” shall mean the United States of America.

“Viacom-Horsehead Settlement Agreement” shall mean the Settlement Agreement executed on February 14, 2002, between the Owner Settling Defendants, on the one hand, and Settling Defendant Viacom International Inc., on the other hand-

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of

CERCLA, 42 U.S.C. § 9601(33); and (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

‘Work’ shall mean all activities Settling Defendants are required to perform under this Consent Decree, except those required by Section XXV (Retention of Records).

V. General Provisions

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health and welfare and the environment at the Site by the design and implementation of response actions at OU1, OU2, and OU3 by the Settling Defendants, to provide access to the Site necessary to perform and oversee the Work, to reimburse response costs of the Plaintiff, and to resolve the claims of Plaintiff against Settling Defendants and the claims of Settling Defendants against Plaintiff, as provided in this Consent Decree.

6. Commitments by Settling Defendants. By entering into this Consent Decree, Settling Defendants are not, nor should they be construed to be, admitting any liability for matters addressed herein or any findings of facts or conclusions of law contained herein. Notwithstanding this denial of liability, the Settling Defendants agree as follows:

a. Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, the OU1 ROD, the OU2 O&M Plan, the OU3 ROD, and all work plans and other plans, standards, specifications, and schedules set forth herein, or developed by the United States or by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse or pay the United States for Past Response Costs, Future Response Costs, and DOI Future Response Costs as provided in this Consent Decree. Owner Settling Defendants also shall provide access to the Site and other property in accordance with Section IX (Access and Institutional Controls) of this Consent Decree.

b. Settling Defendants Viacom and TCI Pacific shall comply with EPA Unilateral Administrative Order, EPA Docket No. **III-99-002-DC**, issued on December **10, 1999** (the “UAO”), and shall perform all work required under the UAO in accordance with the terms of the UAO, until such time as the UAO is superseded by this Consent Decree pursuant to this Paragraph. Upon the Effective Date, this Consent Decree shall supersede the UAO with respect to all subsequent obligations and the UAO shall be terminated. Unless and until this Consent Decree is entered by the Court, the UAO shall not be superseded. Any documents that are required to be submitted under this Consent Decree that have been submitted by Settling Defendants Viacom and TCI Pacific pursuant to the UAO need not be resubmitted after the date that this Consent Decree supersedes the UAO, unless EPA determines that such submittal is inadequate.

c. The Settling Defendants have commenced certain portions of the Work relating to OU3 prior to the Effective Date. To the extent that Settling Defendants have fulfilled obligations under this Consent Decree prior to the Effective Date, Settling Defendants shall also be deemed to have fulfilled such obligations under this Consent Decree.

d. The obligations of Settling Defendants to finance and perform the Work and to pay amounts owed the United States under this Consent Decree are joint and several, unless explicitly limited to less than all Settling Defendants in this Consent Decree. In the event of the failure of any one or more Settling Defendants to implement the requirements ~~of~~ this Consent Decree, the remaining Settling Defendants shall complete all such requirements.

e. In the event that any of the Settling Defendants files for bankruptcy or is placed involuntarily in bankruptcy proceedings after the Effective Date, such Settling Defendant shall notify the United States within three (3) days of such filing. The United States

acknowledges that on August 19, 2002, Horsehead Industries, Inc. and Horsehead Resource Development Company, Inc. filed a petition for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, in the United States Bankruptcy Court for the Southern District of New York, Case No. 02-14024.

7. Effect of Settlement on Certain Pre-Existing Agreements and Orders.

a. Upon the Effective Date, this Consent Decree shall supersede and terminate, with respect to any outstanding obligations of Settling Defendants or the United States relating specifically to OU1, OU2, or OU3, the Administrative Order by Consent in the Matter of Palmerton Zinc Site, EPA Docket No. III-85-23-DC, dated September 24, 1985, and any amendments thereto, between the United States and Respondents Horsehead Industries, Inc., and its Division, the New Jersey Zinc Company, and Gulf & Western Industries, Inc.; the Administrative Order for Removal Response Activities, EPA Docket No. III-92-06-DC, dated February 11, 1992, issued by the United States to Paramount Communications Inc.; and the 1999 UAO as set forth in Paragraph 6.b., above.

b. Upon receipt by the United States of the payment due under Paragraph 77.e. of this Consent Decree, this Consent Decree shall supersede, with respect to any subsequent obligations of Settling Defendants or the United States relating specifically to OU1, OU2, or OU3, the Consent Decree between the United States and Zinc Corporation of America, a Division of Horsehead Industries, Inc., in the matter captioned United States v. Zinc Corporation of America, Civil Action No. 88-1688 (M.D. Pa.), entered on October 14, 1988.

c. Nothing in this Consent Decree shall supersede or otherwise affect any obligations of the Parties under any agreements between the United States and any Settling

Defendant relating to the Site, other than those agreements specifically identified in Paragraphs 6.b, 6.c, 7.a, or 7.b of this Consent Decree.

d. Notwithstanding any other provision of this Consent Decree, this Consent Decree specifically does not supercede and has no effect on the obligations of Settling Defendants Horsehead Industries, Inc. and Horsehead Resource Development Corporation, Inc. under the Multimedia Consent Decree. The Multimedia Consent Decree remains in **full** force and effect, and the United States' retains all rights to enforce that Decree pursuant to its terms.

8. Settlement Agreement Between Settling Defendant Viacom and Owner Settling Defendants. The Parties recognize and acknowledge that on February 14, 2002, a Settlement Agreement was executed between the Owner Settling Defendants, on the one hand, and Settling Defendant Viacom, on the other hand ("Viacom-Horsehead Settlement Agreement"). This Viacom-Horsehead Settlement Agreement does not affect the Settling Defendants' obligations to the United States under the **terms** of this Consent Decree. However, the Parties understand that the Owner Settling Defendants and Viacom will implement their obligations under the Consent Decree in accord with the terms of the Viacom-Horsehead Settlement Agreement, and nothing in this Consent Decree shall alter the terms and meaning of the Viacom-Horsehead Settlement Agreement **as** between the Owner Settling Defendants and Viacom.

9. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws **as** set forth in the OU1 ROD, OU2 ROD, OU2 ESD, and the OU3 ROD.

The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

10. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (*i.e.*, within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

11. Notice to Successors-&Title.

a. Within fifteen (15) days after the Effective Date of this Consent Decree, for any property owned or controlled by any Settling Defendant that is located within OU1 or OU2, such Settling Defendant(s) shall submit to EPA for review and approval a proposed notice to be filed with the Recorder's Office (or Registry of Deeds or other appropriate office), Carbon County, Commonwealth of Pennsylvania, providing notice to all successors-in-title: (1) that the property is part of OU1 or OU2, that EPA selected a remedy for OU1 on September 4, 1987, and/or for OU2 on June 29, 1988 (modified as described in the OU2 ESD issued on August 27,

2002); and (2) that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedies at OU1 **and** OU2. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court.

(1) Property owned or controlled by Owner Settling Defendants within OU1. Within ten (10) days of Owner Settling Defendants' receipt of EPA's approval of the above proposed notice, the Owner Settling Defendant(s) shall record the notice(s) for the following parcels: (i) Parcel No. 29-33-90; (ii) Parcel No. 18-32-A9; (iii) Parcel No. 30-33-A1; (iv) Parcel No. 42-33-B6; **and** (v) Parcel No. 42-33-B7. Upon recordation of the notice for the identified parcels, the Owner Settling Defendants may remove any prior notice placed on those parcels by the Owner Settling Defendants pursuant to the 1999 UAO. If between January 1, 2000, and the Effective Date, any Settling Defendant(s) acquired ownership or control over any additional parcels located within OU1, the applicable Settling Defendant(s) shall record the EPA-approved notice with respect to such additional parcels within sixty (60) days of EPA's approval of the notice. Settling Defendant(s) shall provide EPA with a certified copy of the recorded notice(s) within ten (10) days of recording such notice(s).

(2) Properly owned or controlled by Owner Settling Defendants within OU2. Within ten **(10)** days of Owner Settling Defendants' receipt of EPA's approval of the above proposed notice, the Owner Settling Defendant(s) shall record the approved notice(s) for the specific properties identified on Appendix B 1 to this Consent Decree. Settling Defendant(s) shall provide EPA with a certified copy of the recorded notice(s) within ten (10) days of recording such notice(s).

”

b. At least thirty (30) days prior to the conveyance of any interest in property located within OU1 and OU2 including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Settling Defendant(s) conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to OU1 or OU2 (hereinafter referred to as “access easements”) pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a **right** to enforce restrictions on the use of such property (hereinafter referred to as “restrictive easements”) pursuant to Section IX (Access and Institutional Controls). At least thirty (30) days prior to such conveyance, the Settling Defendant(s) conveying the interest shall also give written notice to EPA and the Commonwealth of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee. Provision of notice to EPA shall not be construed to require EPA approval of such sale or conveyance. However, Owner Settling Defendants shall require, **as** a condition of such conveyance, that any grantee of property within OU1 or OU2 execute an agreement that **grants** access to such property consistent **with** the requirements of Section IX (Access and Institutional Controls) of this Consent Decree.

c. In the event of any such conveyance by a Settling Defendant, that Settling Defendant’s obligations under this Consent Decree, including, but not limited to, its obligations pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Settling Defendant. In no event shall conveyance by a Settling Defendant, or assignment of this Consent Decree, release or otherwise affect the liability of that Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent

of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree. However, Horsehead may not assign its rights and obligations under this Consent Decree to the grantee except as set forth in Paragraph 2.b., above.

VI. Performance of the Work By Settling Defendants

A. Work on Operable Unit 1

12. Selection of Contractors.

a. OU1 Supervising Contractor.

(1) All aspects of the Work relating to Operable Unit 1 to be performed by Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling, and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the OU1 Supervising Contractor. On January 27, 2000, EPA approved Adrian Brown Consultants, Inc. as the Supervising Contractor for OU1. On April 3, 2002, Settling Defendants notified EPA that they proposed to change their OU1 Supervising Contractor to Frank & Cowles, Inc. On May 2, 2002, EPA approved Frank & Cowles, Inc. as the OU1 Supervising Contractor. On September 1, 2002, Frank & Cowles, Inc. changed its name to Frank & West Environmental Engineers, Inc.

(2) If at any time Settling Defendants propose to change their OU1 Supervising Contractor, Settling Defendants shall notify EPA and NPS, with a copy to the Commonwealth, in writing of the name, title, and qualifications of the contractor proposed to be the new OU1 Supervising Contractor and must ~~obtain~~ a notice of acceptance of such change from EPA, after a reasonable opportunity for review and comment by NPS and the Commonwealth, before the new OU1 Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

(3) If **EPA** fails to provide written notice of its acceptance or disapproval as provided in this Paragraph and this failure prevents the Settling Defendants **from** meeting one or more deadlines in a plan approved by **EPA** pursuant to **this** Consent Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of the Consent Decree.

b. Other OU1 Contractors and Subcontractors.

(1) The Settling Defendants shall submit to **EPA**, **NPS**, and the Commonwealth, for acceptance by **EPA**, the names and qualifications of any additional contractors and subcontractors they propose to use to implement any significant aspect of the Work relating to OU1 before such contractor **or** subcontractor performs any work. If **EPA** does not respond with a notice accepting or disapproving the proposal for additional contractors and subcontractors within fourteen **(14)** days of receipt by **EPA** of Settling Defendants' submission, the proposal for use of the identified additional contractors and subcontractors shall be deemed accepted.

(2) In the event **EPA** disapproves any proposed contractor or subcontractor, Settling Defendants shall submit to **EPA**, **NPS**, and the Commonwealth a list of at least three contractors or subcontractors, including the qualifications of each, that would be acceptable to them within ten (10) days of receipt of **EPA's** notice of disapproval. **EPA** will provide written notice of the names of any contractor(s) or subcontractor(s) whose selection it would accept. Settling Defendants may select any contractor or subcontractor from that list and shall notify **EPA**, **NPS**, and the Commonwealth of the name of the contractor or subcontractor selected within five (5) days of **EPA's** written notice.

13. Remedial Design for OU1.

a. In March **2000**, Settling Defendants submitted, and EPA approved, a work plan for the design of the Remedial Action at **OU1** (“**OU1 Remedial Design Work Plan**”). EPA subsequently approved a revised work plan in August **2000**. The **OU1 Remedial Design Work Plan** (as revised in August 2000) is attached hereto as Appendix C1 and is incorporated into and enforceable under this Consent Decree. The Settling Defendants have also submitted to EPA a Health and Safety Plan for **OU1** for field design activities which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, **29 C.F.R. § 1910.120**.

b. Settling Defendants have initiated implementation of, and shall continue to implement, the **OU1 Remedial Design Work Plan** in accordance with the requirements of the Work Plan, this Paragraph **13** of this Consent Decree, and the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions).

c. On August 4, 2000, Settling Defendants submitted to EPA a Preliminary Design for **OU1** (“**OU1 Preliminary Design**”) which incorporates approximately thirty percent (30%) of the design effort. EPA provided conditional approval of the **OU1 Preliminary Design** on August **7, 2000**. Included in the **OU1 Preliminary Design** are plans and specifications for pilot tests to be performed in order to determine whether certain methods or technologies would be effective at meeting the remedial action objectives of the **OU1 ROD**. An initial pilot test was performed in October 2001, and the results of the pilot test were summarized in a (First) Test Plot Report dated January **10, 2002**, which also included a proposal for a second pilot test.

d. EPA has approved a second pilot test Work Plan for non-NPS property located within **OU1**. Within **45** days of completion of the second pilot test, Settling Defendants

shall submit a (Second) Test Plot Report to EPA and NPS, with a copy to the Commonwealth. NPS may also submit a proposal for a pilot test to be performed by Settling Defendants on property owned by **NPS** in OU1.

e. Upon receipt of the (Second) Test Plot Report ~~and~~, if applicable, the **NPS** Pilot ~~Report~~, EPA shall either approve or disapprove the Reports ~~as~~ provided in Section XI (EPA Approval of Plans and Other Submissions). In the event that EPA disapproves the Report(s) and determines that modification of the Report(s) is necessary, or that one or more additional pilot tests are required, Settling Defendants shall modify the Report(s) as directed by EPA, or perform such other pilot tests as required by EPA and submit the results of such test[s] to EPA and **NPS**, with a copy to the Commonwealth, in the form of an additional Test Plot Report[s]. Upon approval, approval with conditions, or modification by EPA, as provided in Section XI (EPA Approval of Plans and Other Submissions), of the (Second) Test Plot Report, the **NPS** Pilot Report, and/or a subsequent Test Plot Report, the approved test plot reports shall constitute the Final Test Plot Reports. Within forty-five **(45)** days after EPA approves the Final Test Plot Reports, Settling Defendants shall submit an OU1 Pre-Final Design to EPA for review and approval, with a copy to NPS and the Commonwealth. This submittal shall represent approximately ninety percent (90%) of the design effort. The OU1 Pre-Final Design shall address all of EPA's comments on the OU1 Preliminary Design and on the Final Test Plot ~~Report~~ and shall include, at a minimum:

- (1) pre-final plans, specifications, and schedules;
- (2) a Pre-Final OU1 Operation and Maintenance Plan ("OU1 **O&M** Plan");

(3) Performance Standards for OU1, including specific Performance Standards for measuring the success of the application of the revegetation components as well as the success of the establishment of the vegetative growth;

(4) a Pre-Final OU1 Construction Management Plan;

(5) a Pre-Final OU1 Construction Quality Assurance Plan (“OU1 CQAP”) (detailing the approach to quality assurance during construction activities at OU1, and specifying a quality assurance official (“OU1 QA Official”), independent of the OU1 Supervising Contractor, to conduct a quality assurance program during the construction phase of the project);

(6) a Pre-Final OU1 Sampling and Analysis Plan (“OU1 **SAP**”), directed at measuring progress towards meeting the Remedial Action objectives of the OU1 ROD and the Performance Standards for OU1;

(7) a Pre-Final OU1 Health and Safety Plan for field activities required by the Pre-Final/Final Design which conforms to applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120;

(8) a Pre-Final OU1 Decontamination Plan which provides procedures and plans for decontamination of equipment and disposal of contaminated materials;

(9) a Pre-Final OU1 Contingency Plan;

(10) a Pre-Final OU1 Permitting Requirements Plan for any work that may require permits; and

(11) a Pre-Final OU1 Property Access Plan.

f. Upon approval, approval with conditions, or modifications by EPA, as provided in Section XI (EPA Approval of Plans and Other Submissions), of the OU1 Pre-Final Design, including the required Performance ~~Standards~~ therein, the Performance ~~Standards~~ as approved shall become OU1 Performance Standards as that term is defined in the Consent Decree. Within forty-five **(45)** days after EPA approves the OU1 Pre-Final Design, Settling Defendants shall submit ~~an~~ OU1 Final Design for the remedy to EPA for review and approval, with a copy to NPS and the Commonwealth. The OU1 Final Design, which shall address all of EPA's comments on the OU1 Pre-Final Design, shall include, at a minimum:

- (1) final plans, specifications, and schedules;
- (2) the final OU1 O&M Plan;
- (3) the final OU1 Construction Management Plan;
- (4)** the final OU1 CQAP;
- (5)** the final OU1 SAP;
- (6)** the final OU1 Health and Safety Plan for field activities;
- (7)** the final OU1 Decontamination Plan;
- (8)** the final OU1 Contingency Plan;
- (9)** the final OU1 Permitting Requirements Plan, if necessary;
- (10) the final OU1 Property Access Plan;
- (11) an OU1 Design Analysis Report that contains all of the Design calculations; and
- (12) a final project delivery strategy.

14. Remedial Action for OU1.

- a. Upon approval, approval ~~with~~ conditions, or modification by EPA, ~~as~~ provided in Section XI (EPA Approval of Plans and Other Submissions), of all components of the OU1 Final Design submittal, the OU1 Final Design submittal shall serve ~~as~~ the OU1 Remedial Action Work Plan and shall be incorporated into this Consent Decree and made an enforceable part hereof. The Settling Defendants shall implement the activities required under the OU1 Remedial Action Work Plan in accordance with the schedules and methodologies contained therein.
- b. The Settling Defendants shall submit to EPA, with a copy to NPS and the Commonwealth, all plans, submittals, or other deliverables required under the OU1 Remedial Action Work Plan in accordance with the approved schedule therein for review and approval by EPA pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA or required under the OU1 Remedial Design Work Plan, the Settling Defendants shall not commence physical activities at OU1 prior to the date for commencement set forth in the approved schedule in the OU1 Remedial Action Work Plan.
- c. If Settling Defendants seek to retain a construction contractor to assist in the performance of the OU1 Remedial Action, then Settling Defendants shall submit to EPA not later ~~than~~ five (5) business days after publishing the solicitation documents a copy of those portions of the solicitation documents, including but not limited to the relevant portions of the Request For Proposals, that are not subject to claims of business confidentiality. Settling Defendants shall ensure that the requirements of the final OU1 Health and Safety Plan for field activities accepted by EPA and the final OU1 Decontamination Plan approved by EPA are met by all of Settling Defendants' contractors.

d. Within thirty (30) days after EPA approves the **OU1** Remedial Action Work Plan, Settling Defendants shall notify EPA, NPS, and the Commonwealth in writing of the name, title, and qualifications of any construction contractor(s) proposed to be used in carrying out Work relating to **OU1** under this Consent Decree. Not later than forty-five **(45)** days after EPA's acceptance of the **OU1** Remedial Action contractor(s), Settling Defendants shall submit to EPA for review and approval, with a copy to **NPS** and the Commonwealth, an updated **OU1** Construction Management Plan, an updated **OU1** Health and Safety Plan for field activities, and an updated **OU1** Decontamination Plan for field activities. The **OU1** Construction Management Plan shall identify key personnel, their experience, their qualifications, and their responsibilities for construction activities, and shall include a detailed schedule for completing all construction activities. Upon approval by EPA pursuant to Section XI (EPA Approval of Plans and Other Submissions), the **OU1** Construction Management Plan shall be incorporated into this Consent Decree and made an enforceable part hereof.

e. Resident Supervisor for **OU1**. Following EPA approval, approval with conditions, or modification by EPA, as provided in Section XI (EPA Approval of Plans and Other Submissions), of all components of the **OU1** Final Design submittal, and prior to commencement of any on-Site Work under the **OU1** Remedial Action Work Plan, the Settling Defendants shall submit to EPA, NPS, and the Commonwealth the name and qualifications of a Resident Supervisor to be present at the Site during construction to ensure that the Work is performed in accordance with the approved **OU1** Remedial Action Work Plan. The **OU1** Resident Supervisor shall be familiar with all aspects of the **OU1** Remedial Design approved by EPA. EPA retains the right to disapprove the use of any Resident Supervisor proposed by Settling Defendants. In the event EPA disapproves the use of any proposed Resident Supervisor,

Settling Defendants shall submit to EPA, **NPS**, and the Commonwealth a list of at least ~~three~~ replacements, including the qualifications of each, who would be acceptable to them within five **(5)** business days of receipt of EPA's notice. EPA will provide written notice of the names of any replacements whose use it would accept. Settling Defendants may select any replacement **from** the EPA notice and shall notify EPA, **NPS**, and the Commonwealth of the name of the replacement selected within three (3) business days of EPA's written notice. Settling Defendants shall ensure that the OU1 Resident Supervisor performs on-Site inspections as necessary to ensure compliance with the approved OU1 Remedial Action Work Plan and that the results of such inspections are promptly provided to Settling Defendants, EPA, NPS, and the Commonwealth. The OU1 Resident Supervisor may act as the QA Official.

15. Within thirty (30) days after EPA approves the OU1 Construction Management Plan, Settling Defendants shall begin on-Site implementation of the OU1 Remedial Action, unless EPA approves a later date based on prevailing conditions at the Site. Upon approval by EPA of the OU1 Construction Management Plan, Settling Defendants shall implement and comply with the schedules and terms of all deliverables relating to OU1 Remedial Action, including the OU1 Remedial Action Work Plan and the OU1 Construction Management Plan.

16. The Settling Defendants shall continue to implement the OU1 Remedial Action and OU1 O&M Plan until the Performance Standards for OU1 are achieved and for so long thereafter as is otherwise required under this Consent Decree.

17. Modification of the OU1 Work Plans.

a. If EPA determines that modification to the Work specified in the OU1 Remedial Design Work Plan, the OU1 Remedial Action Work Plan, the OU1 Construction Management Plan, the OU1 O&M Plan, and/or in other work plans developed for OU1 pursuant

to this Consent Decree is necessary to achieve and maintain the Performance ~~Standards~~ for OU1 or to carry out and maintain the effectiveness of the remedy set forth in the OU1 ROD, EPA may (1) require that such modification be incorporated into the OU1 Remedial Design Work Plan, OU1 Remedial Action Work Plan, OUI O&M Plan, and/or any other plan relating to such Work, and/or (2) require that Settling Defendants' submit a plan for EPA approval which incorporates such modification to the Work and implement such approved plan. Provided, however, that a modification may be required pursuant to this Paragraph only to the extent that it is consistent with the scope of the remedy selected in the OU1 ROD.

b. For the purposes of this Paragraph 17 and Paragraphs 69 (Completion of the Remedial Action for OU1) and 70 (Completion of the Work for OU1) only, the "scope of the remedy selected in the OU1 ROD is:

(1) ~~tasks~~ employing a revegetation technology or Combination of revegetation technologies to achieve the remedial action objectives of minimizing direct contact with contaminated soil, reducing the volume of runoff, reducing contamination in the runoff, and mitigating environmental damage;

(2) tasks associated with monitoring of Operable Unit 1 conditions and the effectiveness of the OU1 Remedial Action; and

(3) tasks associated with implementation of Section IX (Access and Institutional Controls) of this Consent Decree as applicable to OU1.

c. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX, Paragraph 94 (Record Review). The OU1 Remedial Design Work Plan, OU1 Remedial Action

Work Plan, OU1 O&M Plan, and/or related work plans shall be modified in accordance with the final resolution of the dispute.

d. Settling Defendants shall implement **any** work required by **any** modifications incorporated into the OU1 Remedial Design Work Plan, OU1 Remedial Action Work Plan, OU1 O&M Plan, and/or in work plans developed in accordance with this Paragraph.

e. Nothing in this Paragraph shall be ~~construed~~ to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

18. Settling Defendants acknowledge **and** agree that nothing in this Consent Decree, the OU1 Remedial Design or the OU1 Remedial Action Work Plans constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the OU1 work plans will achieve the Performance Standards for OU1 or any other work plan for OU1.

19. Off-Site Shipment of Waste

a. Settling Defendants shall, prior to any off-Site shipment of Waste Material from OU1 to an out-of-state waste management facility, provide written notification to the appropriate environmental official in the receiving facility's state and to the EPA Project Coordinator, with a copy to NPS, of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

(1) The Settling Defendants shall include in the written notification the following information, where available: (a) the name and location of the facility to which the Waste Material is to be shipped; (b) the **type** and quantity of the Waste Material to be shipped; (c) the expected schedule for the shipment of the Waste Material; and (d) the method

of transportation. The Settling Defendants shall notify the appropriate state environmental official in the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(2) The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for OU1 Remedial Action construction. The Settling Defendants shall provide the information required by Paragraph 19.a. as soon as practicable after the award of the contract but in no case less than seven (7) days before the Waste Material is actually shipped.

b. Before shipping any Waste Materials from OU1 to an off-Site location, Settling Defendants shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440. Settling Defendants shall only send Waste Materials from OU1 to an off-Site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

B. Work on Operable Unit 2

20. Selection of Contractors.

a. In the event that Settling Defendants intend to engage a contractor to perform any significant aspect of the Work relating to the OU2 O&M, the Settling Defendants shall submit to EPA and the Commonwealth, for acceptance by EPA, the names and qualifications of the contractors they propose to use before such contractor performs any work. If EPA does not respond with a notice accepting or disapproving the proposal for use of contractors within fourteen (14) days of receipt by EPA of Settling Defendants' submission, the

proposal for use of the identified contractor shall be deemed accepted. Settling Defendants Viacom and TCI Pacific have submitted Frank & West as the contractor they intend to use to perform significant aspects of the Work related to OU2 O&M. EPA has approved Viacom and TCI Pacific's use of Frank & West.

b. In the event EPA disapproves any contractor proposed under Paragraph 20.a, Settling Defendants shall submit to EPA and the Commonwealth a list of at least three contractors, including the qualifications of each, that would be acceptable to them within ten (10) days of receipt of EPA's notice of disapproval. EPA will provide written notice of the names of any contractor(s) whose selection it would accept. Settling Defendants may select any contractor from that list and shall notify EPA and the Commonwealth of the name of the contractor selected within five (5) business days of EPA's written notice.

21. Remedial Actions at OU2.

Settling Defendant HII is required to perform work at OU2 pursuant to the Multimedia Consent Decree. As set forth in the OU2 ESD, EPA anticipates that performance of the work required under Paragraphs 74-89 of the Multimedia Consent Decree should achieve the primary remedial action objectives of the OU2 ROD, modified as described in the OU2 ESD. Therefore, this Consent Decree does not require specific remedial activities, except for OU2 O&M, beyond those activities required under Paragraphs 74-89 of the Multimedia Consent Decree. Settling Defendant HII will implement all activities required by the Multimedia Consent Decree in accordance with the terms of that Multimedia Consent Decree, and all obligations imposed on Settling Defendant HII under the Multimedia Consent Decree shall be exclusively enforced under the Multimedia Consent Decree. Settling Defendant HII shall submit copies of all plans,

submittals, or other deliverables required under the Multimedia Consent Decree to the EPA

Alternate Project Coordinator.

22. Operation and Maintenance for OU2.

a. Within ~~thirty~~ (30) days of entry of this Consent Decree, Settling Defendants shall submit to EPA for approval a plan, including a schedule for implementation, for Operation and Maintenance for OU2 (“OU2 O&M Plan”). The OU2 O&M Plan shall include, at **a minimum:**

(1) a Vegetation Plan for ensuring that areas of OU2 which have been revegetated pursuant to the Revised PRT Work Plan, as required by the Multimedia Consent Decree, are inspected regularly and that the vegetation is maintained;

(2) a Monitoring Plan that describes the frequency and methodology used to monitor those portions of the Cinder Bank which contain internal fires;

(3) plans and schedules for the preparation and submission of an OU2 Contingency Plan addressing the potential future need to cover and vegetate portions of the Cinder ~~Bank~~ that contain internal fires;

(4) an updated Health and Safety Plan for field activities occurring in the area of the Cinder Bank which contain internal fires;

(5) a Decontamination Plan which provides procedures and plans for decontamination of equipment and disposal of contaminated materials; and

(6) an Access Control Plan which describes how access to the Cinder Bank will be limited.

b. Upon approval, approval upon conditions, or modification by EPA, as provided in Section XI (EPA Approval of Plans and Other Submissions) below, the OU2 O&M

Plan shall be attached to this Consent Decree ~~as~~ Appendix C3 and shall be incorporated into and become enforceable as part of this Consent Decree. The Settling Defendants shall implement all activities required by the OU2 O&M Plan, and shall submit all plans, submittals, or other deliverables required under the OU2 O&M Plan to EPA and the Commonwealth, in accordance with the approved schedule for review and approval by EPA pursuant to Section XI (EPA Approval of Plans and Other Submissions).

23. The Settling Defendants shall continue to implement the OU2 O&M Plan for so long ~~as~~ is necessary to maintain the OU2 Performance ~~Standards~~ and as otherwise required under this Consent Decree.

24. Modification of the OU2 O&M Plan.

a. If EPA determines that modification to the Work specified in the OU2 O&M Plan is necessary to maintain the OU2 Performance Standards or to maintain the effectiveness of the remedy set forth in the OU2 ROD, modified ~~as~~ described in the OU2 ESD, EPA may (1) require that such modification be incorporated into the OU2 O&M Plan, and/or (2) require that Settling Defendants submit a plan for EPA approval which incorporates such modification to the Work and implements such approved plan, provided, however, that a modification may be required pursuant to this Paragraph only to the extent that it is consistent with the scope of the activities required in the OU2 O&M Plan.

b. For the purposes of this Paragraph 24 and Paragraph 71 (Completion of the Remedial Action for OU2) and Paragraph 72 (Completion of the Work for OU2) only, the “scope of the activities required in the OU2 O&M Plan” means:

(1) tasks employing a technology or technologies discussed in the OU2 O&M Plan to maintain the OU2 Performance Standards;

(2) tasks associated with monitoring **of** OU2 conditions and the effectiveness of the OU2 Remedial Action and O&M; and

(3) ~~tasks~~ associated with implementation **of** Section **IX** (Access and Institutional Controls) **of** this Consent Decree as applicable to OU2.

c. **If** Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph **94** (Record Review). The OU2 O&M Plan and/or related work plans shall be modified in accordance with the final resolution **of** the dispute.

d. Settling Defendants shall implement any work required by any modifications incorporated in the OU2 O&M Plan, and/or in work plans developed in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions **as** otherwise provided in this Consent Decree.

25. Settling Defendants acknowledge and agree that nothing in this Consent Decree ~~or~~ the OU2 O&M Plan constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set **forth** in the OU2 work plans will achieve or maintain the OU2 Performance Standards.

C. Work on Operable Unit 3.

26. Selection **of** Contractors.

a. OU3 Supervising Contractor.

(1) All aspects **of** the Work relating to Operable Unit 3 to be performed by Settling Defendants pursuant to Sections **VI** (Performance **of** the Work by Settling Defendants), VII (Remedy Review), **VIII** (Quality Assurance, Sampling and Data

Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the **OU3** Supervising Contractor. On April 18, 2002, Settling Defendants notified **EPA** that they proposed to use Cummings Riter, Inc. as their **OU3** Supervising Contractor. On May 2, 2002, **EPA** approved Cummings Riter, Inc. as the Supervising Contractor for **OU3**.

(2) If at any time Settling Defendants propose to change their **OU3** Supervising Contractor, Settling Defendants shall notify **EPA** and the Commonwealth in writing of the name, title, and qualifications of the contractor proposed to be the new **OU3** Supervising Contractor and must obtain a notice of acceptance of such change from **EPA**, after a reasonable opportunity for review and comment by the Commonwealth, before the new **OU3** Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

(3) If **EPA** fails to provide written notice of its acceptance or disapproval as provided in this Paragraph and this failure prevents the Settling Defendants from meeting one or more deadlines in a plan approved by **EPA** pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree.

b. Other **OU3** Contractors and Subcontractors.

(1) The Settling Defendants shall submit to **EPA** and the Commonwealth, for acceptance by **EPA**, the names and qualifications of any additional contractors and subcontractors they propose to use to implement any significant aspect of the Work relating to **OU3** before such contractor or subcontractor performs any work. If **EPA** does not respond with a notice accepting or disapproving the proposal for use of the identified additional contractors and subcontractors within fourteen (14) days of receipt by **EPA** of

Settling Defendants' submission, the proposal for additional contractors and subcontractors shall be deemed accepted.

(2) In the event EPA disapproves any proposed contractor or subcontractor, Settling Defendants shall submit to EPA and the Commonwealth a list of at least three contractors or subcontractors, including the qualifications of each, that would be acceptable to them within ten (10) days of receipt of EPA's notice of disapproval. EPA will provide written notice of the names of any contractor(s) or subcontractor(s) whose selection it would accept. Settling Defendants may select any contractor or subcontractor from that list and shall notify EPA and the Commonwealth of the name of the contractor or subcontractor selected within five (5) days of EPA's written notice.

27. Remedial Design for OU3.

a. On September 6, 2002, Settling Defendants submitted to EPA, and EPA approved, a work plan for the design of the Remedial Action at Operable Unit 3. In June 2003, Settling Defendants submitted to EPA, and EPA approved, a revised work plan for the design of the Remedial Action at Operable Unit 3 ("OU3 Remedial Design Work Plan"). The OU3 Remedial Design Work Plan provides for design of the remedy set forth in the OU3 ROD and for achievement of the Performance Standards for OU3 and other requirements set forth in the OU3 ROD and this Consent Decree. The OU3 Remedial Design Work Plan is attached hereto as Appendix C2 and shall be enforceable under this Consent Decree.

b. The OU3 Remedial Design Work Plan includes plans and schedules for implementation of all remedial design and pre-design tasks.

c. Settling Defendants shall implement the OU3 Remedial Design Work Plan in accordance with the schedules and methodologies contained therein, including preparation and

submission of an OU3 Final Design submittal. The Settling Defendants shall submit to EPA all plans, submittals, and other deliverables required under the approved OU3 Remedial Design Work Plan in accordance with the approved schedule therein for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions).

28. Remedial Action for OU3.

a. Upon approval, approval with conditions, or modification by EPA, as provided in Section XI (EPA Approval of Plans and Other Submissions), of all components of the OU3 Final Design submittal, the OU3 Final Design submittal shall serve as the OU3 Remedial Action Work Plan and shall be incorporated into this Consent Decree and made an enforceable part hereof. The Settling Defendants shall implement the activities required under the OU3 Remedial Action Work Plan in accordance with the schedules and methodologies contained therein.

b. The Settling Defendants shall submit all plans, submittals, or other deliverables required under the OU3 Remedial Action Work Plan to EPA, with a copy to the Commonwealth, in accordance with the approved schedule for review and approval by EPA pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA or required under the OU3 Remedial Design Work Plan, the Settling Defendants shall not commence physical activities at OU3 prior to the date for commencement set forth in the approved schedule in the OU3 Remedial Action Work Plan.

c. If Settling Defendants seek to retain a construction contractor to assist in the performance of the OU3 Remedial Action, then Settling Defendants shall submit to EPA not later than five (5) business days after publishing the solicitation documents a copy of those portions of the solicitation documents, including but not limited to the relevant portions of the

Request For Proposals, that are not subject to claims of business confidentiality. Settling Defendants shall ensure that the requirements of the final **OU3** Health and Safety Plan for field activities accepted by EPA and the final **OU3** Decontamination Plan approved by EPA are met **by** all of Settling Defendants' contractors.

d. Within ~~thirty~~ **(30)** days after EPA approves the **OU3** Remedial Action Work Plan, Settling Defendants shall notify EPA and the Commonwealth in writing of the name, title, and qualifications of any construction contractor(s) proposed to be used in carrying out Work relating to **OU3** under this Consent Decree. Not later than forty-five **(45)** days after EPA's acceptance of the **OU3** Remedial Action contractor(s), Settling Defendants shall submit to EPA, with a copy to the Commonwealth, an updated **OU3** Construction Management Plan, an updated **OU3** Health and Safety Plan for field activities, and an updated **OU3** Decontamination Plan for field activities, for review and approval by EPA. The **OU3** Construction Management Plan shall identify key personnel, their experience, their qualifications, and their responsibilities for construction activities, and shall include a detailed schedule for completing all construction activities. Upon approval by EPA, the **OU3** Construction Management Plan shall be incorporated into this Consent Decree and made an enforceable part hereof.

e. Resident Supervisor for **OU3**. Following EPA approval, approval with conditions, or modification by EPA, **as** provided in Section XI (EPA Approval of Plans and Other Submissions), of all components of the **OU3** Final Design submittal, and prior to commencement of **any** on-Site Work under the **OU3** Remedial Action Work Plan, the Settling Defendants shall submit to EPA and the Commonwealth the name and qualifications of a Resident Supervisor to be present at **OU3** during construction to ensure that the Work is performed in accordance with the approved **OU3** Remedial Action Work Plan. The **OU3**

Resident Supervisor shall be familiar with all aspects of the OU3 Remedial Design approved by EPA. EPA retains the right to disapprove the use of any Resident Supervisor proposed by Settling Defendants. **In** the event EPA disapproves the **use** of any proposed Resident Supervisor, Settling Defendants shall submit to EPA and the Commonwealth a list of at least three replacements, including the qualifications of each, who would be acceptable to them ~~withi~~ five (5) business days of receipt of EPA's notice. EPA will provide written notice of the names of any replacements whose use it would accept. Settling Defendants may select any replacement from the EPA notice and shall notify EPA and the Commonwealth of the name of the replacement selected within three (3) business days of EPA's written notice. Settling Defendants shall ensure that the OU3 Resident Supervisor performs on-Site inspections **as** necessary to ensure compliance with the approved OU3 Remedial Action Work Plan and that the results of such inspections are promptly provided to Settling Defendants, EPA, and the Commonwealth. The OU3 Resident Supervisor may act **as** the OU3 QA Official.

29. Within thirty **(30)** days after EPA approves the OU3 Construction Management Plan (or **as** otherwise provided for in the schedule included in the approved Remedial Action Work Plan), Settling Defendants shall begin on-Site implementation of the OU3 Remedial Action. Upon approval by EPA of the OU3 Construction Management Plan, Settling Defendants shall implement and comply with the schedules and terms of all deliverables relating to OU3 Remedial Action including the OU3 Remedial Action Work Plan and the OU3 Construction Management Plan.

30. The Settling Defendants shall continue to implement the OU3 Remedial Action and OU3 O&M Plan until the Performance Standards for OU3 are achieved and for so long thereafter as is otherwise required under this Consent Decree.

31. Modification of the OU3 Work Plans.

a. If EPA determines that modification to the Work specified in the OU3 Remedial Design Work Plan, the OU3 Remedial Action Work Plan, the OU3 Construction Management Plan, the OU3 O&M Plan, and/or in other work plans developed for OU3 pursuant to this Consent Decree is necessary to achieve and maintain the Performance Standards for OU3 or to carry out and maintain the effectiveness of the remedy set forth in the OU3 ROD, EPA may (1) require that such modification be incorporated into the OU3 Remedial Design Work Plan, OU3 Remedial Action Work Plan, OU3 O&M Plan, and/or any other plan relating to such Work, and/or (2) require that Settling Defendants submit a plan for EPA approval which incorporates such modification to the Work and implement such approved plan. Provided, however, that a modification may be required pursuant to this Paragraph only to the extent that it is consistent with the scope of the remedy selected in the OU3 ROD.

b. For the purposes of this Paragraph 31 and Paragraphs 73 (Completion of the Remedial Action for OU3) and 74 (Completion of the Work for OU3) only, the “scope of the remedy selected in the ROD” means:

(1) tasks employing a technology or combination of technologies discussed in Section IX (The Selected Remedy & Contingent Remedy: Description and Performance Standards for Each Component of the Selected Remedy & Contingent Remedy) of the OU3 ROD to achieve and maintain the objectives and Performance Standards described in the OU3 ROD;

(2) tasks associated with monitoring of OU3 conditions and the effectiveness of the OU3 Remedial Action; and

(3) tasks associated with implementation of Section IX (Access and Institutional Controls) of this Consent Decree as applicable to OU3.

c. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 94 (Record Review). The OU3 Remedial Design Work Plan, OU3 Remedial Action Work Plan, OU3 O&M Plan, and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendants shall implement any work required by any modifications incorporated in the OU3 Remedial Design Work Plan, OU3 Remedial Action Work Plan, OU3 O&M Plan, and/or in work plans developed in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

32. Settling Defendants acknowledge and agree that nothing in this Consent Decree or the OU3 Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the OU3 work plans will achieve the Performance Standards for OU3.

33. Off-Site Shipment of Waste

a. Settling Defendants shall, prior to any off-Site shipment of Waste Material from OU3 to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

(1) The Settling Defendants shall include in the written notification the following information, where available: (a) the name and location of the facility to which the Waste Material is to be shipped; (b) the type and quantity of the Waste Material to be shipped; (c) the expected schedule for the shipment of the Waste Material; and (d) the method of transportation. The Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(2) The identity of each receiving facility and state will be determined by the Settling Defendants following the award of the contract for Remedial Action construction. The Settling Defendants shall provide the information required by Paragraph 33.a as soon as practicable after the award of the contract but in no case less than seven (7) days before the Waste Material is actually shipped.

b. Before shipping any Waste Material from OU3 to an off-Site location, Settling Defendants shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440. Settling Defendants shall only send Waste Material from OU3 to an off-Site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence. If the Settling Defendants obtain all necessary approvals to transfer soil removed from OU3 residential properties for use in Operation and Maintenance activities for OU2, then such transfer shall not be considered shipment of Waste Materials off-Site for purposes of this Paragraph 33.b.

VII. Remedy Review

34. Periodic Review. Settling Defendants shall conduct any studies and investigations at OU1, OU2 and OU3 if requested by EPA, in order to permit EPA to conduct

reviews of whether the Remedial Actions are protective of human health and the environment at the Site at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

35. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action for OU1, the Remedial Action for OU2, and/or the Remedial Action for OU3 are not protective of human health and the environment, EPA may select further response actions for OU1, OU2, and/or OU3 under the authority of and in accordance with the requirements of CERCLA and the NCP.

36. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

37. Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions for the OU1 and/or OU3, the Settling Defendants shall undertake such further response actions provided that the respective reopener conditions in Paragraphs 110-112 and 116-118 are satisfied. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 94 (Record Review), to dispute (1) EPA's determination that the reopener conditions of Paragraphs 110-112 and 116-118 of Section XXI (Covenants Not to Sue by Plaintiff) are satisfied, (2) EPA's determination that the relevant Remedial Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions.

38. Submissions of Plans. If Settling Defendants are required to perform further response actions pursuant to the preceding Paragraph, they shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendants) and shall implement the plan approved by EPA in accordance with the provisions of this Decree.

VIII. Quality Assurance, Sampling, and Data Analysis

39. a. While conducting all sample collection and analysis activities required by this Consent Decree with respect to OU1, OU2 O&M, and OU3, the Settling Defendants shall implement quality assurance, quality control, and chain of custody procedures in accordance with "EPA Requirements for Quality Assurance Project Plans (EPA QA/R-5)" (EPA 240 B-01 003, March 2001); "EPA NEIC Policies and Procedures Manual," (May 1986) (EPA 330/978-001-R); National Functional Guidelines for Inorganic Data Review (EPA 540/R-94/013) and Modifications to the National Functional Guidelines for Inorganic Data Review (EPA Region III: April 1993); National Functional Guidelines for Organic Data Review (EPA 540/R-94/012) and Modifications to the National Functional Guidelines for Organic Data Review (EPA Region III: September 1994); "Region III Innovative Approaches to Data Validation," (EPA Region III: September 1994); "Data Quality Objectives Process for Superfund," (EPA 540/R-93/071: September 1994); and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the Commonwealth, a Quality Assurance Project Plan for the Work at the relevant Operable Unit. Each QAPP must be consistent with the NCP and the guidance documents cited above. If approved Work Plans submitted under this Consent

Decree contain site-specific procedures that vary from those contained in the documents listed above, then those EPA approved site-specific procedures shall govern. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the OU1, OU2 O&M, and/or OU3 QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree.

Settling Defendants shall submit to EPA each selected laboratory's(ies') Quality Assurance Program Plan and their qualifications, which shall include, at a minimum, previous certifications, Performance Evaluation ("PE") results, equipment lists and personnel resumes. Settling Defendants shall condition each contract entered into with a laboratory to perform work under this Consent Decree upon the following conditions, and shall use reasonable best efforts to ensure: (1) that EPA and Commonwealth personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree; (2) that such laboratories shall analyze all samples submitted by EPA pursuant to the applicable QAPP(s) for quality assurance monitoring; (3) that the laboratories utilized for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods; and (4) that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the applicable QAPP(s) approved by EPA. At the request of EPA, Settling Defendants shall conduct one or more audits, not to exceed one audit every calendar year, of the selected laboratory(ies) to verify analytical capability and compliance with the applicable QAPP(s) developed and approved pursuant to this Consent Decree. The audit shall be directed at determining compliance with the applicable QAPP during analysis of samples taken pursuant to the Consent Decree, and to the extent practicable, auditors shall

conduct lab audits during the time the laboratory(ies) is analyzing samples collected pursuant to this Consent Decree. The lab audit shall be conducted according to procedures available from the QA Branch. Audit reports shall be submitted to the EPA Project Coordinator within fifteen (15) days of completion of the audit. The Settling Defendants shall report serious deficiencies, including all those deficiencies which adversely impact data quality, reliability or accuracy, and take action to correct such deficiencies within 24 hours of the time the Settling Defendants knew or should have known of the deficiency.

b. All quality assurance, sampling and data analysis required to be undertaken by Owner Settling Defendants pursuant to the Multimedia Consent Decree shall be governed exclusively by the Multimedia Consent Decree.

40. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA or its authorized representatives and, for samples taken on NPS property, by NPS or its authorized representatives. Settling Defendants shall notify EPA and, for any sampling activity on NPS property, NPS, not less than seven (7) days in advance of any sample collection activity unless shorter notice is agreed to by EPA or, as applicable, NPS. In addition, EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA and NPS shall allow the Settling Defendants to take split or duplicate samples of any samples they take as part of the oversight of the Settling Defendants' implementation of the Work.

41. Settling Defendants shall submit to EPA and the Commonwealth two (2) copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to OU1, OU2 O&M, and OU3 and/or the implementation of this Consent Decree unless EPA agrees otherwise. Settling Defendants shall also submit to NPS

two (2) copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to OUI.

42. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

IX. Access and Institutional Controls

43. Commencing on the effective date of this Consent Decree, the Owner Settling Defendants shall provide the United States and the Commonwealth, and their representatives, including EPA and its contractors, and the Non-Owner Settling Defendants and their contractors, with access at all reasonable times to any part of the Site, or any other property where access is needed to implement this Consent Decree, that is owned or controlled by the Owner Settling Defendants, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- a. Monitoring the Work;
- b. Verifying any data and/or information submitted to the United States and/or the Commonwealth;
- c. Conducting investigations relating to contamination at or near the Site relating to this Consent Decree;
- d. Obtaining samples required or authorized by this Consent Decree;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site;

- f. Assessing implementation of quality assurance and quality control practices as defined in the approved OU1, OU2 O&M, and OU3 Quality Assurance Project Plans;
- g. Implementing the Work pursuant to the conditions set forth in Paragraph 120 of this Consent Decree;
- h. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents in connection with compliance with this Consent Decree and consistent with Section XXIV (Access to Information);
- i. Assessing Settling Defendants' compliance with this Consent Decree; and
- j. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree.

Any Party or representative of a Party seeking access to property owned or controlled by Owner Settling Defendants under this Paragraph shall comply with all safety, health and hazard training requirements pertaining to such access under applicable law.

44. a. If any portion of the Site, or any other property where access is needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to secure from such persons an agreement to provide access thereto for Settling Defendants, as well as for the United States and the Commonwealth, and their representatives (including contractors), for the purpose of conducting any activity relating to this Consent Decree, including, but not limited to, those activities listed in Paragraph 43 of this Consent Decree.

b. Subject to Paragraph 46 below, if any portion of the Site, or any other property where land use restrictions, including easements, are needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to secure from such persons such land use restrictions as are necessary to implement this Consent Decree.

45. For purposes of Paragraph 44.a. of this Consent Decree only, "best efforts" includes the payment of reasonable sums of money in consideration of access, except that Settling Defendants shall not be required to pay money to secure access to any Residential Property in OU3 where such access is solely for purposes of implementing sampling and remedial activities on that same Residential Property. If any access or land use restriction agreements required by Paragraph 44 of this Consent Decree are not obtained within sixty (60) days of the time that EPA notifies Settling Defendants, or Settling Defendants determine, that such access or land use restriction is required, Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with Paragraph 43 or 44, as applicable, of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access or land use restrictions, either in the form of contractual agreements or in the form of easements running with the land. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Payments for Response Costs), for all costs incurred, direct and/or indirect, by the United States in obtaining access and/or land use restrictions, including, but not limited to, the cost of attorney time, except that Settling Defendants shall not be required to reimburse the United States for costs incurred to secure

access to any Residential Property in OU3 where such access is solely for purposes of implementing sampling and remedial activities on that same Residential Property.

46. If EPA determines that land use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the OU1 ROD, the OU2 ROD, the OU2 ESD, and/or the OU3 ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls.

47. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

48. The Settling Defendants shall implement the following Institutional Controls with respect to Remedial Actions at OU1, OU2, and OU3:

a. Institutional Controls for OU1: Commencing on the date of entry of this Consent Decree:

(1) Settling Defendants shall not conduct any activities on or with respect to property located within or comprising OU1 that interfere with or adversely affect the integrity or protectiveness of the remedial measures for OU1 to be implemented pursuant to this Consent Decree, or that would impair the ability of the United States to manage its land and resources located within OU1, provided however that the preceding restrictions shall not prevent HII or HRDC from continuing business operations so long as such operations do not interfere with or adversely affect the integrity or protectiveness of the remedial measures for OU1 to be implemented pursuant to this Consent Decree;

(2) Owner Settling Defendants shall not use, or allow to be used, for residential development or agricultural purposes any property located within OU1 that is owned or controlled by Owner Settling Defendants;

(3) Owner Settling Defendants shall file notice of the conditions set forth in Paragraph 48(a)(1) and (2) in accordance with the procedures set forth in Paragraph 11.a. of this Consent Decree; and

(4) For any portions of OU1 that are used or come to be used for any recreational purposes, Settling Defendants shall assist, as requested by the United States, in placing signs or other appropriate warning notices informing potential recreational users of the potential for exposure to pollutants or contaminants along any trails or other features within OU1.

b. Institutional Controls for OU2: Commencing on the date of entry of this Consent Decree:

(1) Settling Defendants shall not conduct any activities on or with respect to property located within or comprising OU2 that interfere with or adversely affect the integrity or protectiveness of the remedial measures for OU2 to be implemented pursuant to the Multimedia Consent Decree and this Consent Decree; and

(2) Settling Defendants shall implement the Access Control Plan for OU2 in accord with the requirements of Paragraph 22 of this Consent Decree and the OU2 O&M Plan as approved by EPA.

c. Institutional Controls for OU3: Commencing on the date of entry of this Consent Decree, Settling Defendants shall provide assistance to state and/or local governments in instituting a program which will ensure that future buyers of property found to be eligible for

participation in the Remedial Action for OU3 through the sampling process described in the OU3 ROD but whose owner(s) decline to participate in the Remedial Action are aware of the sampling results for that property. This assistance includes, but is not limited to, the following:

(1) providing the database generated as part of the implementation of the Remedial Action for OU3 to the state and/or local government entity which institutes the notification program;

(2) participating in meetings with EPA and State and/or local governments; and

(3) providing assistance for development of any computer program or other tools needed to institute such a program, and, if necessary, providing funding for such a program.

X. Reporting Requirements

49. Progress Reports.

a. In addition to any other requirement of this Consent Decree, Settling Defendants shall submit to EPA and the Commonwealth two (2) copies in written or electronic form of separate monthly progress reports ("Progress Reports"), unless EPA determines that less frequent reports are appropriate, for OU1, OU2 O&M and OU3 that: (1) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month for the relevant operable unit; (2) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the previous month for the relevant operable unit; (3) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month for the relevant operable unit; (4) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and

provide other information relating to the progress of construction for the relevant operable unit, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (5) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work for the relevant operable unit, and a description of efforts made to mitigate those delays or anticipated delays; (6) include any modifications to the work plans or other schedules for the relevant operable unit that Settling Defendants have proposed to EPA or that have been approved by EPA; and (7) describe all activities undertaken in support of the Community Relations Plan for the relevant operable unit during the previous month and those to be undertaken in the next six weeks.

b. Settling Defendants shall also provide two (2) copies to NPS of all Progress Reports required by Subparagraph a. above that relate to OU1.

c. Settling Defendants shall submit the required Progress Reports to EPA, NPS, and the Commonwealth by the tenth day of every month following entry of the Consent Decree, unless EPA determines that less frequent reports are appropriate, and until EPA notifies the Settling Defendants pursuant to Paragraph 70.b, Paragraph 72.b, and Paragraph 74.b of Section XIV (Certification of Completion). If requested by EPA, Settling Defendants shall also provide briefings for EPA, NPS, and the Commonwealth to discuss the progress of the Work.

50. The Settling Defendants shall notify EPA of any change in the schedule described in the Progress Reports for the performance of any activity, including, but not limited to, implementation of work plans, no later than seven (7) days prior to the performance of the activity. Notwithstanding the foregoing, the Settling Defendants shall notify EPA of any change in the schedule described in the Progress Reports for the performance of data collection no later than thirty (30) days prior to the performance of such activity.

51. Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), Settling Defendants shall within twenty-four (24) hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region III, United States Environmental Protection Agency at (215) 814-3255. If such an event potentially impacts OU1, Settling Defendants shall also provide oral notification to the NPS Project Coordinator. The reporting requirements in this Paragraph are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

52. Within twenty (20) days of the onset of such an event, Settling Defendants shall furnish to EPA's Project Coordinator a written report, with a copy to NPS if the event potentially impacts OU1, signed by the applicable Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendants shall submit to EPA's Project Coordinator, with a copy to NPS if the event potentially impacts OU1, a report setting forth all actions taken in response thereto.

53. Settling Defendants shall submit three (3) copies of all plans, reports, and data required by the OU1 and OU3 Remedial Design Work Plans, the OU1 and OU3 Remedial Action Work Plans, the OU2 O&M Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendants shall simultaneously submit one (1) copy of all such plans, reports and data to the Commonwealth, and two (2) copies to NPS of all

such plans, reports and data relating to OUI. Upon request by EPA, Settling Defendants shall submit in electronic form all portions of any report or other deliverable Settling Defendants are required to submit pursuant to the provisions of this Consent Decree. Submittal of such plans, reports, and data in electronic form will be considered compliance with the provisions of this Section X (Reporting Requirements) of this Consent Decree.

54. All reports and other documents submitted by Settling Defendants to EPA (other than the Progress Reports referred to above) which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by a Duly Authorized Representative of the Settling Defendants.

XI. EPA Approval of Plans and Other Submissions

55. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the Commonwealth, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within fourteen (14) days, or such other time as specified by EPA in such notice not to be less than fourteen (14) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate to EPA a bad faith lack of effort to submit an acceptable deliverable.

56. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 55(a), (b), or (c), Settling Defendants shall proceed to take any action

required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 55(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

57. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 55(d), Settling Defendants shall, within fourteen (14) days or such other time as specified by EPA in such notice not to be less than fourteen (14) days, correct the deficiencies and resubmit the plan, report, or other item to EPA for approval, with a copy to the Commonwealth, and if the submission relates to OUI, with a copy to NPS. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the fourteen (14) day period, or otherwise specified period, but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 58 and 59.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 55(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties).

58. In the event that a resubmitted plan, report, or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop

the plan, report, or other item. Settling Defendants shall implement any such plan, report, or item as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XIX (Dispute Resolution).

59. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX.

60. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XII. Project Coordinators

61. Project Coordinators for the United States

a. EPA's Project Coordinator shall be:

Charles J. Root (3HS21)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Telephone: (215) 814-3193
Fax: (215) 814-3002

EPA's Alternate Project Coordinator shall be:

Eugene Dennis (3HS21)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Telephone: (215) 814-3202
Fax: (215) 814-3002

DOI's Project Coordinator shall be:

Pamela Underhill, Park Manager
Appalachian National Scenic Trail
National Park Service
Harpers Ferry Center (Deliveries: Third Floor, Civil War Story Bldg.)
Harpers Ferry, WV 25425
Telephone: (304) 535-6279
Fax: (304) 535-6270

EPA and NPS have the discretionary, non-reviewable right to change their respective Project Coordinators. If EPA or NPS intends to change its Project Coordinator, EPA or NPS will inform Settling Defendants in writing as soon as practicable of the name, address, and telephone number of the new Project Coordinator.

62. Settling Defendants have notified EPA, in writing, of the name, address, and telephone number of their designated Project Coordinators and Alternate Project Coordinators for OU1, OU2 O&M, and OU3. EPA has approved the Settling Defendants' Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed by Settling Defendants, the identity of the successor will be given to EPA, and to NPS if the proposed change is for OU1, prior to the change, unless impracticable, but in no event later than two (2) business days after the change is made. The Settling Defendants' Project Coordinator[s] and Alternate Project Coordinator[s] shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all

aspects of the Work. The Settling Defendants' Project Coordinator[s] and Alternate Project Coordinator[s] shall not be an attorney for any of the Settling Defendants in this matter, unless specifically approved by EPA upon written request from a Settling Defendant. He or she may assign other representatives, including other contractors, to serve as an OU1, OU2, and/or OU3 representative for oversight of performance of daily operations during remedial activities.

63. The United States may designate other qualified representatives, including, but not limited to, EPA, NPS, and Commonwealth employees, and federal and Commonwealth contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have all the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-Scene Coordinator ("OSC") by the NCP, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the NCP, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at OU1, OU2, and/or OU3 constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of a hazardous substance.

64. EPA's Project Coordinator and the applicable Settling Defendants' Project Coordinator will meet, at a minimum, on a weekly basis during construction or when sampling activities are taking place. EPA's Project Coordinator and the Settling Defendants' Project Coordinator will meet, at a minimum, on a monthly basis during other phases of the Remedial Action. Telephone conference calls may substitute for such meetings upon approval of EPA.

XIII. Assurance of Ability to Complete Work

65. Within thirty (30) days of entry of this Consent Decree, one or more Settling Defendants shall establish and maintain financial security in the amount of \$27,000,000 in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Settling Defendants; or
- e. A demonstration that one or more of the Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f).

Adequate financial security shall be maintained by the Settling Defendants until EPA agrees that the Work has been completed and issues a Certification of Completion in accordance with Paragraphs 69.b., 71.b., and 73.b.

66. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 65.d of this Consent Decree, Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 65.d or 65.e, they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling

Defendants shall, within thirty (30) days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 65 of this Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

67. If Settling Defendants can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 65 above after entry of this Consent Decree, Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendants may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

68. Settling Defendants may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. Settling Defendants may also propose the use of an alternative form of financial assurance consistent with the requirements of this Section, subject to review and approval, in writing, by EPA. A change in the form of financial assurance that is agreed upon by EPA and the Settling Defendants shall not require approval by the Court. However, in the event of a dispute, Settling Defendants may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

XIV. Certification of Completion

69. Completion of the Remedial Action for OU1

a. Within ninety (90) days after Settling Defendants conclude that the Remedial Action for OU1 has been fully performed and the Performance Standards have been attained, Settling Defendants shall schedule and conduct a pre-certification inspection for OU1 to be attended by Settling Defendants, EPA, NPS, and the Commonwealth. If, after the pre-certification inspection, the Settling Defendants still believe that the Remedial Action for OU1 has been fully performed and the Performance Standards have been attained, they shall submit a written report requesting certification to EPA for approval, pursuant to Section XI (EPA Approval of Plans and Other Submissions), with a copy to NPS and the Commonwealth, within thirty (30) days of the inspection. In the report, a registered professional engineer (if appropriate), the Settling Defendants' Project Coordinator for OU1, and another Duly Authorized Representative of Settling Defendants shall state that the Remedial Action for OU1 has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a Duly Authorized Representative of a Settling Defendant and the Settling Defendants' Project Coordinator for OU1:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection for OU1 and receipt and review of the written report for OU1, EPA, after reasonable opportunity to review and comment by NPS and the Commonwealth, determines that the Remedial Action for OU1 or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards for OU1 have not been achieved, EPA will notify Settling Defendants in writing of the specific

activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Remedial Action for OU1 and achieve the Performance Standards for OU1, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD for OU1," as those terms are defined in Paragraph 17.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion for OU1 and, after a reasonable opportunity for review and comment by NPS and the Commonwealth, that the Remedial Action for OU1 has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for OU1 for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiff). The Certification of Completion of the Remedial Action for OU1 shall not affect Settling Defendants' remaining obligations under this Consent Decree.

70. Completion of the Work for OU1

a. Within ninety (90) days after Settling Defendants conclude that all phases of the Work relating to OU1 (including O & M) have been fully performed, Settling Defendants

shall schedule and conduct a pre-certification inspection of OU1 to be attended by Settling Defendants, EPA, NPS, and the Commonwealth. If, after the OU1 pre-certification inspection, the Settling Defendants still believe that the Work relating to OU1 has been fully performed, Settling Defendants shall submit to EPA and NPS, with a copy to the Commonwealth, a written report by a registered professional engineer, if appropriate, or otherwise by Settling Defendants' Project Coordinator for OU1, stating that the Work for OU1 has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a Duly Authorized Representative of a Settling Defendant and the Settling Defendants' Project Coordinator for OU1:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by NPS and the Commonwealth, determines that any portion of the Work relating to OU1 has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the OU1 Work, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD for OU1," as that term is defined in Paragraph 17.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in

accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for the Certification of Completion for OU1 by Settling Defendants and, after a reasonable opportunity for review and comment by NPS and the Commonwealth, that the Work relating to OU1 has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

71. Completion of the Remedial Action for OU2

a. At such time that Settling Defendant HII seeks to terminate some or all of its obligations relating to the Cinder Bank pursuant to Paragraphs 164, 165 or 167 of Section XXVIII (Effective Date and Termination) of the Multimedia Consent Decree, Settling Defendant HII shall submit a copy of the request for termination and any related materials, as well as any response by EPA or the Commonwealth to such request, to the EPA Project Coordinator identified in Section XII (Project Coordinators) of this Consent Decree.

b. The OU2 Remedial Action, except for OU2 O&M, will be deemed complete, and EPA will so certify in writing to the Settling Defendants, when EPA and the Commonwealth either:

(1) File a Notice of Completion with this Court pursuant to Paragraph 161 of the Multimedia Consent Decree stating that HII has complied with the requirements of the Multimedia Consent Decree and requesting the Court to enter an order terminating the Multimedia Consent Decree; or

(2) File Notice(s) of Completion pursuant to Paragraph 164 of the Multimedia Consent Decree for each outfall covered in Paragraphs 74-89 of the Multimedia

Consent Decree stating that HII has demonstrated compliance with the relevant parameters for each outfall for twelve consecutive months and requesting the Court to enter an order terminating HII's obligations with respect to those outfalls; or

(3) Move jointly with HII pursuant to Paragraph 162 of the Multimedia Consent Decree to terminate the Multimedia Consent Decree based on their representation that all of the requirements of the Multimedia Consent Decree have been met.

EPA's certification pursuant to this Paragraph shall constitute the Certification of Completion of the Remedial Action for OU2 for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiff). The Certification of Completion of the Remedial Action for OU2 shall not affect Settling Defendants' obligations under this Consent Decree or under the Multimedia Consent Decree.

72. Completion of the Work for OU2

a. Within ninety (90) days after Settling Defendants conclude that all phases of the Work relating to OU2 (including O&M required pursuant to this Consent Decree and pursuant to the Multimedia Consent Decree), have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection of OU2 to be attended by Settling Defendants, EPA and the Commonwealth. If, after the OU2 pre-certification inspection, the Settling Defendants still believe that the Work relating to OU2 has been fully performed, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work for OU2 has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a Duly Authorized Representative of a Settling Defendant and the Settling Defendants' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and

complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the Commonwealth, determines that any portion of the Work relating to OU2 has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the OU2 Work, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the activities required in the OU2 O&M Plan," as that term is defined in Paragraph 24.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for the Certification of Completion for OU2 by Settling Defendants and, after a reasonable opportunity for review and comment by the Commonwealth, that the Work relating to OU2 has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

73. Completion of the Remedial Action for OU3.

a. Within ninety (90) days after Settling Defendants conclude that the Remedial Action for OU3 has been fully performed and the Performance Standards for OU3 have been attained, Settling Defendants shall schedule and conduct a pre-certification inspection

for OU3 to be attended by Settling Defendants, EPA, and the Commonwealth. If, after the OU3 pre-certification inspection, the Settling Defendants still believe that the Remedial Action for OU3 has been fully performed and the Performance Standards for OU3 have been attained, they shall submit a written report requesting certification to EPA for approval, with a copy to the Commonwealth, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer, if appropriate, the Settling Defendants' Project Coordinator for OU3, or another Duly Authorized Representative of Settling Defendants shall state that the Remedial Action for OU3 has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a Duly Authorized Representative of a Settling Defendant and the Settling Defendants' Project Coordinator for OU3:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection for OU3 and receipt and review of the written report for OU3, EPA, after reasonable opportunity to review and comment by the Commonwealth, determines that the Remedial Action for OU3 or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards for OU3 have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Remedial Action for OU3 and achieve the Performance Standards for OU3, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD for OU3," as those terms are defined in Paragraph 31.b. EPA will set forth in the

notice a schedule for performance of such activities consistent with the Consent Decree or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting the Certification of Completion for OU3 and, after a reasonable opportunity for review and comment by the Commonwealth, that the Remedial Action for OU3 has been performed in accordance with this Consent Decree and that the Performance Standards for OU3 have been achieved, EPA will so certify in writing to Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for OU3 for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiff). The Certification of Completion of the Remedial Action for OU3 shall not affect Settling Defendants' remaining obligations under this Consent Decree.

74. Completion of the Work for OU3.

a. Within ninety (90) days after Settling Defendants conclude that all phases of the Work relating to OU3 (including O & M), have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection for OU3 to be attended by Settling Defendants, EPA and the Commonwealth. If, after the OU3 pre-certification inspection, the Settling Defendants still believe that the Work relating to OU3 has been fully performed, Settling Defendants shall submit a written report by a registered professional engineer, if appropriate, or otherwise by Settling Defendants' Project Coordinator for OU3, stating that the Work relating to

OU3 has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a Duly Authorized Representative of a Settling Defendant and the Settling Defendants' Project Coordinator for OU3:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the Commonwealth, determines that any portion of the Work relating to OU3 has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work relating to OU3, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD for OU3," as that term is defined in Paragraph 31.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for the Certification of Completion for OU3 by Settling Defendants and, after a reasonable opportunity for review and comment by the Commonwealth, that the Work relating to OU3 has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

XV. Emergency Response

75. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to Paragraph 76, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendants shall notify the EPA Region III Hotline at (215) 814-3255. If such an event potentially impacts OU1, Settling Defendants shall also provide notification to the NPS Project Coordinator. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to this Consent Decree. In the event that Settling Defendants fail to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendants shall reimburse EPA for all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs).

76. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not to Sue by Plaintiff).

XVI. Payments for Response Costs

77. Payments to EPA for Past Response Costs.

- a. Within thirty (30) days of the Effective Date, Settling Defendants shall pay to EPA \$12,600,000.00 in payment for Past Response Costs.
- b. Payment of the above amount shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1998V00578, EPA Site/Spill ID Number 0326, and DOJ Case Number 90-11-2-271m. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Pennsylvania following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.
- c. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States in accordance with Section XXVI (Notices and Submissions) and to the Docket Clerk (3RC00), U.S. EPA, 1650 Arch Street, Philadelphia, PA 19103-2029.
- d. The total amount to be paid by Settling Defendants pursuant to Paragraph 77.a. shall be deposited in the Palmerton Zinc Pile Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.
- e. Settling Defendant Horsehead Industries, Inc. agrees that it owes EPA \$252,745.00 in payment of oversight costs due under the 1988 Consent Decree, referenced in Section I.L. of this Consent Decree.

(1) Subject to approval of the Bankruptcy Court, if necessary, HII shall make payment to EPA of the above amount within twenty (20) days of receipt of funds emanating from HII's settlement, approved by the Bankruptcy Court's Order dated July 31, 2003, with a certain environmental insurance carrier with respect to the Site. HII shall promptly seek any Bankruptcy Court approval necessary to make this payment.

(2) In the event that HII is prevented by order of the Bankruptcy Court from completing the settlement with its insurance carrier described in Paragraph 77.e(1) or from making payment of certain proceeds from that settlement to EPA, HII shall identify EPA's claim for \$252,745.00 in its Plan of Reorganization and shall propose to the Bankruptcy Court that the claim be treated as an Allowed Unsecured Claim in favor of EPA for that amount. Payment of the claim under this Paragraph 77.e(2) shall be made in accordance with the confirmed Plan of Reorganization approved by the Bankruptcy Court in the Bankruptcy Case, or, in the event that no Plan of Reorganization is confirmed, as an Allowed Unsecured Claim in accordance with the requirements of 11 U.S.C. § 726.

(3) Any payments made under this Paragraph 77.e. shall be transferred to EPA in accordance with Paragraphs 77.b. and c., above. The total amount to be paid pursuant to this Paragraph 77.e. shall be deposited in the Palmerton Zinc Pile Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

78. Payments to EPA for Future Response Costs.

a. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan, excluding the first \$1,750,000.00 of Future

Response Costs. For purposes of Paragraphs 78.a. and b., Future Response Costs shall include Future Oversight Costs incurred by EPA in connection with oversight of the OU1 Remedial Action and the OU3 Remedial Action and the OU2 O&M, but shall not include Future Oversight Costs incurred by EPA in connection with oversight of the OU1 Remedial Design and the OU3 Remedial Design except as set forth in Paragraph 78.c., below.

b. Beginning one year after the end of the first fiscal quarter following the Effective Date, and annually thereafter, EPA shall submit to Settling Defendants a cost summary setting forth the Future Response Costs incurred during the prior period, including a summary of all Future Oversight Costs. At such time as the total Future Response Costs incurred amount to \$1,750,000.00, EPA shall notify Settling Defendants in writing pursuant to Section XXVI (Notices and Submissions), and include with such notice a cost summary, setting forth the total Future Response Costs incurred, including a summary of all Future Oversight Costs. Thereafter, on a periodic basis, the United States will send Settling Defendants a bill requiring payment that includes a cost summary setting forth the Future Response Costs, including a summary of all Future Oversight Costs, during the corresponding period. Settling Defendants shall make all payments within forty-five (45) days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 78.d., below. Settling Defendants shall make all payments required by this Paragraph 78.b. in accordance with payment instructions to be provided by the United States with the bills. The total amount to be paid by Settling Defendants pursuant to this Paragraph 78.b. shall be deposited in the Palmerton Zinc Pile Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or transferred by EPA to the EPA Hazardous Substance Superfund.

c. The Settling Defendants shall be obligated to reimburse EPA for Future Oversight Costs incurred in connection with oversight of the OU1 Remedial Design and the OU3 Remedial Design only if (i) Future Response Costs exceed \$1,750,000 as set forth in Paragraph 78.a., and (ii) the decision in United States v. Rohm & Haas Co., No. 92-1517 (3d Cir. Aug. 12, 1993), regarding the liability of responsible parties under Section 107(a)(4)(A) of CERCLA for EPA oversight costs is reversed or overturned by the Court of Appeals for the Third Circuit, the United States Supreme Court, or superceded by the United States Congress through amendment to CERCLA or otherwise. Nothing in this Paragraph 78.c. shall be deemed to be an adjudication by this Court or an admission by EPA or the United States or shall be admissible in any other proceeding as to the legal issue whether oversight costs are properly recoverable under Section 107 of CERCLA or pursuant to a settlement of such an action.

d. Settling Defendants may contest payment of any Future Response Costs under this Paragraph 78, including costs within or above the \$1,750,000 amount, if they determine that the United States has made an accounting error, or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. In conjunction with such an objection, Settling Defendants may request additional cost documentation from EPA. Such objection shall be made in writing within forty-five (45) days of receipt of the bill and must be sent to the United States pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within the forty-five (45) day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 78.b. Within forty-five (45) days, the Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the

Commonwealth of Pennsylvania and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendants shall send to the United States, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States prevails in the dispute, within forty-five (45) days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 78.b. If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States in the manner described in Paragraph 78.b; Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph 78.d. in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse EPA for Future Response Costs.

79. Payments to DOI for Response Costs.

- a. Within thirty (30) days of the Effective Date, Settling Defendants shall pay to DOI the amount of \$700,000 for Past Response Costs and DOI Future Response Costs.
- b. Payment of the above amount shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT

procedures, referencing USAO File Number 1998V00578, DOI/NPS Site ID# WASO APT 01, and DOJ Case Number 90-11-2-271m. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Pennsylvania following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

c. At the time of payment, Settling Defendants shall send notice that the payment has been made to the United States in accordance with Section XXVI (Notices and Submissions).

d. The total amount to be paid by Settling Defendants pursuant to this Paragraph 79 shall be deposited in the Department of the Interior Central Hazardous Materials Fund ("DOI Central Hazmat Fund") to be used to conduct or finance response actions at or in connection with the Site.

80. In the event that the payments required by Paragraphs 77.a. or 79.a. are not made within thirty (30) days of the Effective Date, or the payments required by Paragraph 78.b. are not made within forty-five (45) days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue thirty (30) days after the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date the bill is received. The Interest shall accrue through the date of the Settling Defendants' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Settling Defendants' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 98.

The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraphs 77.b. and c. (for Interest due to EPA) or Paragraphs 79.b. and c. (for Interest due to DOI).

81. Except as provided in Paragraph 82 (Sub-Account for Future Response Actions Other than at OU1, OU2, or OU3) below, Settling Defendants shall have no rights in or claims to any monies deposited in or to be deposited in the Palmerton Zinc Pile Special Account, or the account for the Palmerton Zinc Pile Site within the DOI Central Hazmat Fund.

82. Sub-Account for Future Response Actions Other than at OU1, OU2, or OU3.

a. Within forty-five (45) days of the Effective Date, EPA will create a separate sub-account, to be referred to as the Sub-Account for Future Response Actions Other than at OU1, OU2, or OU3 ("Sub-Account"), within the Palmerton Zinc Pile Special Account, and transfer \$750,000.00 from the Palmerton Zinc Pile Special Account into the Sub-Account.

b. The monies deposited in the Sub-Account shall be retained and used to conduct or finance response actions at or in connection with the Site, other than at OU1, OU2, or OU3, to be undertaken subsequent to the Effective Date.

c. The processes for determining how the monies in the Sub-Account may be used, and under what circumstances the Settling Defendants may request use of the monies in the Sub-Account, shall be determined by EPA, after consultation with the Settling Defendants, subsequent to the Effective Date. Prior to such consultation with Settling Defendants, EPA will not withdraw the monies from the Sub-Account or combine the monies in the Sub-Account with any other monies in the Palmerton Zinc Pile Special Account or the EPA Hazardous Substance Superfund.

83. Other than as set forth in Paragraph 82 (Sub-Account for Future Response Actions Other than at OU1, OU2, or OU3) with respect to monies deposited in the Sub-Account, nothing in this Section or in this Consent Decree shall be deemed to create any right or claim in Settling Defendants or any other person other than EPA to monies deposited or to be deposited in the Palmerton Zinc Pile Special Account.

XVII. Indemnification and Insurance

84. Settling Defendants' Indemnification of the United States.

a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Each Settling Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of that Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of that Settling Defendant as an EPA authorized representative under Section 104(e) of CERCLA. Further, each Settling Defendant agrees to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of that Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on

behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendants nor any such contractor shall be considered an agent of the United States.

b. Settling Defendants shall assume liability for, and indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives from any and all claims or causes of action arising from, or on account of, the shipment, treatment, storage, or disposal of any soils, debris, or other Waste Materials removed from OU1, OU2, and/or OU3 pursuant to this Consent Decree.

c. The United States shall give Settling Defendants notice of any claim for which the United States plans to seek indemnification pursuant to this Paragraph 84, and shall consult with Settling Defendants prior to settling such claim.

85. Settling Defendants waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work, including, but not limited to, claims on account of construction delays. In addition, each Settling Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between such Settling Defendant and any person for performance of Work, including, but not limited to, claims on account of construction delays.

86. No later than fifteen (15) days before commencing any on-site Work, Settling Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraphs 69.b, 71.b, and 73.b of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of five

million dollars (\$5,000,000), combined single limit, and automobile liability insurance with limits of \$500,000 dollars, combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants shall provide to EPA certificates of such insurance and, if requested by EPA, a copy of each insurance policy. Settling Defendants shall resubmit such certificates and, if requested by EPA, copies of policies each year on the anniversary of the Effective Date. If Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor. Settling Defendants may satisfy the provisions of this Paragraph 86 if they submit to EPA for approval one of the financial assurance mechanisms of Section XIII (Assurance of Ability to Complete Work) in at least the amounts stated in this Paragraph 86 demonstrating that Settling Defendants are able to pay any claims arising out of Settling Defendants' performance of their obligations under this Consent Decree. Such financial assurance mechanism shall meet all of the requirements of Section XIII (Assurance of Ability to Complete Work). If Settling Defendants seek to utilize the mechanisms set forth in Section XIII (Assurance of Ability to Complete Work) to satisfy the provisions of this Paragraph 86, they must demonstrate an ability to pay the amounts required under this

Paragraph 86, above and beyond that required by the obligations of Section XIII (Assurance of Ability to Complete Work).

XVIII. Force Majeure

87. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

88. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Hazardous Site Cleanup Division, EPA Region III, within forty-eight (48) hours of when Settling Defendants first knew that the event might cause a delay. Within five (5) business days thereafter, Settling Defendants shall provide in writing to EPA, with a copy to NPS if the delay impacts the Work at OU1, an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendants' rationale for

attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors knew or should have known.

89. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendants in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

90. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), they shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of

demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 87 and 88, above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

XIX. Dispute Resolution

91. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between any Settling Defendant(s) and the United States arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

92. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

93. Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by

serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 94 or Paragraph 95.

b. Within fourteen (14) days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 94 or 95. Within seven (7) days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 94 or 95, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 94 and 95.

94. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and

(2) the adequacy of the performance of response actions taken pursuant to this Consent Decree.

Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the provisions of the OU1 ROD, the OU2ROD (as modified by the OU2 ESD), or the OU3 ROD.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Hazardous Site Cleanup Division, EPA Region III, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 94.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 94.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 94.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendants with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph 94, Settling Defendants shall have the burden of demonstrating that the decision of the Hazardous Site Cleanup Division Director is arbitrary and capricious or otherwise not in accordance with law.

Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 94.a.

95. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law shall be governed by this Paragraph.

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 93, the Director of the Hazardous Site Cleanup Division, EPA Region III, will issue a final decision resolving the dispute. The Hazardous Site Cleanup Division Director's decision shall be binding on the Settling Defendants unless, within ten (10) days of receipt of the decision, the Settling Defendants file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendants' motion.

b. Notwithstanding Paragraph BB of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

96. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 105. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any

applicable provision of this Consent Decree. In the event that the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

XX. Stipulated Penalties

97. Settling Defendants shall be liable to the United States for stipulated penalties in the amounts set forth in Paragraphs 98 and 99 for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure).

“Compliance” by Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

98. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraphs b, c, and d:

<i>Penalty Per Violation Per Day</i>	<i>Period of Noncompliance</i>
\$2,000.00	1 st through 14 th day
\$4,000.00	15 th through 30 th day
\$8,000.00	31 st day and beyond

b. Failure to comply with requirements of Section VI (Performance of the Work by Settling Defendants), including failure to comply with the requirements of documents approved by EPA under Section VI, Section VII (Remedy Review), and Section XV (Emergency Response).

c. Failure to make the payments required by Paragraphs 77.a. or 78.b., except that stipulated penalties will not begin to accrue against Settling Defendants for non-payment of the amounts due under Paragraph 77.a. until forty-five (45) days after the Effective Date.

d. Failure to make the payment required by Paragraph 79.a. Penalties accruing under this Paragraph 98.d. shall be due and payable to DOI within forty-five (45) days of Settling Defendants' receipt from DOI of a demand for payment of the penalties, and all such payments shall be made as set forth in Paragraphs 79.b. and c.

99. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

Penalty Per Violation Per Day	Period of Noncompliance
\$ 500.00	1st through 14th day
\$ 1,000.00	15th through 30 th day
\$ 2,000.00	31st day and beyond

b. All requirements of this Consent Decree that are not identified in Paragraph 98 of this Consent Decree.

100. In the event that EPA assumes performance of all of the Work relating to OU1 or of all of the Work relating to OU3 pursuant to Paragraph 120 (Work Takeover) of Section XXI (Covenants Not to Sue by Plaintiff), Settling Defendants shall be liable for a stipulated penalty in the amount of \$250,000.00.

101. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's

receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency; (2) with respect to a decision by the Director of the Hazardous Site Cleanup Division, EPA Region III, under Paragraphs 94.b. or 95.a. of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

102. Following EPA's determination that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendants written notification of the same and describe the noncompliance. EPA may send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in Paragraph 101 regardless of whether EPA has notified the Settling Defendants of a violation.

103. All penalties accruing under this Section, except for penalties accruing to DOI pursuant to Paragraph 98.d., shall be due and payable to EPA within forty-five (45) days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to United States Environmental Protection Agency, Region III, Attention: Superfund Accounting, P.O. Box 360515, Pittsburgh, PA 15251-6515. Settling Defendants shall send copies of the check(s)

to the United States as specified in Section XXVI (Notices and Submissions) and to the Docket Clerk (3RC00), United States Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103-2029, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 0326, the DOJ Case Number 90-11-2-271m, and the name and address of the party making payment.

104. The payment of penalties shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

105. Penalties shall continue to accrue as provided in Paragraph 101 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within forty-five (45) days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA within sixty (60) days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendants to the extent that they prevail.

106. If Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraphs 98.d. or 103.

107. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

108. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XXI. Covenants Not to Sue by Plaintiff

109. a. In consideration of the actions that will be performed, the covenants provided and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 110, 111, 113, 114, 116, 117, and 119 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA relating to Operable Unit 1, Operable Unit 2, and Operable Unit 3, as those terms are defined in this Consent Decree, and for recovery of Past Response Costs, Future Response Costs, Future Oversight Costs, and DOI Future Response Costs as those terms are defined in this Consent Decree. Except with respect to future liability, these covenants not to sue shall take effect upon

the receipt by EPA and DOI, respectively, of the payments required by Paragraphs 77.a. and 79.a. of Section XVI (Payments for Response Costs). With respect to future liability relating to OU1, these covenants not to sue shall take effect upon the Certification of Completion of the Remedial Action for OU1 by EPA pursuant to Paragraph 69.b. of Section XIV (Completion of the Remedial Action for OU1). With respect to future liability relating to OU3, these covenants not to sue shall take effect upon the Certification of Completion of the Remedial Action for OU3 by EPA pursuant to Paragraph 73.b. of Section XIV (Completion of the Remedial Action for OU3).

b. With respect to future obligations to perform response actions or to reimburse response costs with respect to OU2, these covenants not to sue shall take effect upon the Certification of Completion of the Remedial Action for OU2 by EPA pursuant to Paragraph 71.b. of Section XIV (Completion of the Remedial Action for OU2). Provided, however, that all covenants not to sue with respect to such future obligations to perform response actions or to reimburse response costs relating to OU2 shall be null and void as to all Settling Defendants in the event that Settling Defendant HII fails to implement the Revised PRT Work Plan as required by the Multimedia Consent Decree and/or fails to achieve a Certification of Completion of the Remedial Action for OU2 under this Consent Decree. Notwithstanding any other provision of this Consent Decree, including Paragraph 113, if Settling Defendant HII fails to implement the Revised PRT Work Plan as required by the Multimedia Consent Decree and/or fails to achieve a Certification of Completion of the Remedial Action for OU2 under this Consent Decree, the United States retains all of its rights under CERCLA to sue or take administrative action against any of the Settling Defendants with respect to OU2, and Settling Defendants retain all defenses to such an action.

c. The covenants not to sue in this Paragraph 109 are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person, except that the covenants not to sue shall also extend to the corporate successors of Settling Defendants, but only to the extent that the alleged liability of such successors is derived from the alleged liability of Settling Defendants.

110. United States' Pre-Certification Reservations for OU1. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to OU1, or to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action for OU1:

- a. conditions at OU1, previously unknown to EPA, are discovered, or
- b. information, previously unknown to EPA, is received, in whole or in part, and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action for OU1 is not protective of human health or the environment.

111. United States' Post-Certification Reservations for OU1. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to OU1, or to reimburse the United States for additional costs of response if, subsequent to the Certification of Completion of the Remedial Action for OU1:

a. conditions at OU1, previously unknown to EPA, are discovered, or
b. information, previously unknown to EPA, is received, in whole or in part,
and EPA determines that these previously unknown conditions or this information together with
other relevant information indicate that the Remedial Action for OU1 is not protective of human
health or the environment.

112. For purposes of Paragraph 110, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of January 10, 2002 (the date of the submission of the (First) Test Plot Report), and set forth in the Record of Decision for OU1, the Unilateral Administrative Order issued by EPA on December 10, 1999, the administrative record supporting the Record of Decision for OU1, and the administrative record supporting the 1999 UAO, or in any information received by EPA pursuant to the OU1 ROD and the 1999 UAO through January 10, 2002. For purposes of Paragraph 111, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of the Certification of Completion of the Remedial Action for OU1 and set forth in the Record of Decision for OU1, the administrative record supporting the Record of Decision for OU1, the post-ROD administrative record for OU1, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to the Certification of Completion of the Remedial Action for OU1.

113. United States' Pre-Certification Reservations for OU2. The United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to OU2, or to reimburse the United

States for additional costs of response if, prior to Certification of Completion of the Remedial Action for OU2:

- a. conditions at OU2, previously unknown to EPA, are discovered, or
 - b. information, previously unknown to EPA, is received, in whole or in part,
- and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action for OU2 is not protective of human health or the environment.

114. United States' Post-Certification Reservations for OU2. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to OU2, or to reimburse the United States for additional costs of response if, subsequent to the Certification of Completion of the Remedial Action for OU2:

- a. conditions at OU2, previously unknown to EPA, are discovered, or
 - b. information, previously unknown to EPA, is received, in whole or in part,
- and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action for OU2 is not protective of human health or the environment.

115. For purposes of Paragraph 113, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of August 27, 2002 (the date the OU2 ESD was issued), and set forth in the Record of Decision for OU2 and the administrative record supporting the Record of Decision for OU2, the OU2 ESD and the administrative record supporting the OU2 ESD, or in any information received by EPA pursuant

to the Multimedia Consent Decree or the Revised PRT Work Plan through August 27, 2002. For purposes of Paragraph 114, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of the Certification of Completion of the Remedial Action for OU2 and set forth in the Record of Decision for OU2, the administrative record supporting the Record of Decision for OU2, the post-ROD administrative record for OU2, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to the Certification of Completion of the Remedial Action for OU2.

116. United States' Pre-Certification Reservations for OU3. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to OU3, or to reimburse the United States for additional costs of response if, prior to the Certification of Completion of the Remedial Action for OU3:

- a. conditions at OU3, previously unknown to EPA, are discovered, or
 - b. information, previously unknown to EPA, is received, in whole or in part,
- and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action for OU3 is not protective of human health or the environment.

117. United States' Post-Certification Reservations for OU3. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response

actions relating to OU3, or to reimburse the United States for additional costs of response if, subsequent to Certifications of Completion of the Remedial Action for OU3:

- a. conditions at OU3, previously unknown to EPA, are discovered, or
- b. information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action for OU3 is not protective of human health or the environment.

118. For purposes of Paragraph 116, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of June 11, 2003 (the date on which EPA approved the OU3 Remedial Action Work Plan, Revision No. 1), and set forth in the Record of Decision for OU3, the administrative record supporting the Record of Decision for OU3, and any information submitted by Settling Defendants pursuant to prior approved work plans for OU3 and received by EPA's Project Coordinator through June 11, 2003. For purposes of Paragraph 117, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of the Certification of Completion of the Remedial Action for OU3 and set forth in the Record of Decision for OU3, the administrative record supporting the Record of Decision for OU3, the post-ROD administrative record for OU3, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to the Certification of Completion of the Remedial Action for OU3.

119. General reservations of rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 109. The United States

reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters, including, but not limited to, the following:

- a. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of OU1, OU2, or OU3 as those terms are specifically defined in this Consent Decree;
- c. liability based upon, after signature of this Consent Decree by the Settling Defendants, the Settling Defendants' ownership or operation of OU1, OU2, and/or OU3, or upon the Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with OU1, OU2, or OU3, other than as part of the OU1, OU2, and OU3 Remedial Actions, the Work, or otherwise ordered by EPA;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. liability for costs or damages, other than DOI Future Response Costs, incurred or to be incurred by DOI after December 31, 2001, relating to contamination at Operable Unit 1;
- f. criminal liability;
- g. liability for violations of federal or state law which occur during or after implementation of the Work;
- h. liability, prior to the Certification of Completion of the Remedial Action for OU1, for additional response actions that EPA determines are necessary to achieve OU1

Performance Standards, but that cannot be required pursuant to Paragraph 17 (Modification of the OU1 Work Plans);

i. liability, prior to the Certification of Completion of the Remedial Action for OU2, for additional response actions that EPA determines are necessary to achieve OU2 Performance Standards, but that cannot be required pursuant to Paragraph 24 (Modification of the OU2 Work Plans);

j. liability, prior to the Certification of Completion of the Remedial Action for OU3, for additional response actions that EPA determines are necessary to achieve OU3 Performance Standards, but that cannot be required pursuant to Paragraph 31 (Modification of the OU3 Work Plans);

k. liability for any additional Operable Units, including Operable Unit 4, or any area of the Site not included in Operable Unit 1, Operable Unit 2, or Operable Unit 3, as those terms are defined in this Consent Decree;

l. liability for migration of hazardous substances onto Operable Unit 1, Operable Unit 2, or Operable Unit 3, as defined in this Consent Decree, from any area of the Site not included in OU1, OU2, or OU3 which occurs after the date of entry of this Consent Decree; and

m. liability for contamination of land or buildings arising from the presence of fill material containing hazardous substances that has been transported to such land or buildings from the Cinder Bank or the East or West Plants.

120. Work Takeover. In the event EPA determines that Settling Defendants have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an

endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 94 (Record Review) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI, Paragraph 78 (Payments to EPA for Future Response Costs) unless Settling Defendants prevail in Dispute Resolution.

121. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

XXII. Covenants by Settling Defendants

122. Subject to the reservations in Paragraph 126, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States relating to the Matters Addressed in this Consent Decree, or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law, relating to the Matters Addressed in this Consent Decree; and

b. any claims arising out of response actions at or in connection with Operable Unit 1, Operable Unit 2, or Operable Unit 3, as those terms are defined in this Consent Decree, including any claim under the United States Constitution, the Pennsylvania Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

Except as provided in Paragraph 128 (Waiver of Claims Against Residential Owners or Occupants), Paragraph 129 (Waiver of Claims Against De Minimis Parties), Paragraph 130 (Waiver of Claims Against Settled De Minimis Parties), and Paragraph 136 (Waiver of Claim-Splitting Defenses), the covenants not to sue in this Paragraph 122 shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 110, 111, 113, 114, 116, 117, 119(b) - (e) or 119(h) - (l), but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

123. Settling Defendants covenant not to sue and agree not to assert or to maintain any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113 related to the Site.

124. As of the Effective Date, all counterclaims filed by Settling Defendants Horsehead Industries, Inc. and Horsehead Resource Development Company, Inc. against the United States in the instant action captioned United States v. Horsehead Industries, Inc., et al., No. CV-98-0654 (M.D. Pa.), are hereby dismissed with prejudice.

125. Settling Defendants covenant not to sue and agree not to assert or to maintain any direct or indirect claim for disbursement from the Palmerton Zinc Pile Special Account or the Sub-Account (established pursuant to this Consent Decree), except as provided in Paragraph 82.c.

126. The Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while

acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

127. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

128. Waiver of Claims Against Residential Owners or Occupants. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for the Matters Addressed in this Consent Decree, including for contribution, against any person where the person's liability to Settling Defendants with respect to the Matters Addressed in the Consent Decree is based solely on that person's past or present ownership or occupancy of a Residential Property or Properties. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action against such Settling Defendant.

129. Waiver of Claims Against De Micromis Parties. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for the Matters Addressed in this Consent Decree, including for contribution, against any person where the

person's liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if:

a. any materials contributed by such person to the Site constituting Municipal Solid Waste (MSW) or Municipal Sewage Sludge (MSS) did not exceed 0.2% of the total volume of waste at the Site; and

b. any materials contributed by such person to the Site containing hazardous substances, but not constituting MSW or MSS, did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

c. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Matters Addressed in this Consent Decree against such Settling Defendant.

130. Waiver of Claims Against Settled De Minimis Parties. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for the Matters Addressed in this Consent Decree, including for contribution, against any person that has entered into a final CERCLA § 122(g) de minimis settlement with EPA with respect to the Site as of the Effective Date. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or

cause of action relating to the Matters Addressed in this Consent Decree against such Settling Defendant.

XXIII. Effect of Settlement; Contribution Protection

131. Except as provided in Paragraph 128 (Waiver of Claims Against Residential Owners or Occupants), Paragraph 129 (Waiver of Claims Against De Micromis Parties) and Paragraph 130 (Waiver of Claims Against Settled De Minimis Parties), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Except as provided in Paragraph 128 (Waiver of Claims Against Residential Owners or Occupants), Paragraph 129 (Waiver of Claims Against De Micromis Parties) and Paragraph 130 (Waiver of Claims Against Settled De Minimis Parties), each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

132. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for Matters Addressed in this Consent Decree.

133. Notwithstanding Paragraph 132 above, nothing in this Consent Decree shall prevent any Settling Defendant from bringing or maintaining a contribution action or any other claim against any other Settling Defendant.

134. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States in writing no later than thirty (30) days prior to the initiation of such suit or claim.

135. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within ten (10) days of service of the complaint on them. In addition, Settling Defendants shall notify the United States within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

136. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiff).

XXIV. Access to Information

137. Except for those documents for which Settling Defendants assert a privilege as set forth in Paragraph 138.b., Settling Defendants shall provide to EPA and the Commonwealth, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at Operable Unit 1, Operable Unit 2, and Operable Unit 3 or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample

traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA and the Commonwealth, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

138. Business Confidential and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to the United States and the Commonwealth under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the Commonwealth, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the United States and the Commonwealth with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no

documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

139. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXV. Retention of Records

140. Until ten (10) years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraphs 70.b., 72.b., and 74.b. of Section XIV (Certification of Completion), each Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that Settling Defendants who are potentially liable as owners or operators of the Site must retain, in addition, all documents and records that relate to the liability of any other person under CERCLA with respect to the Site. Each Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

141. At the conclusion of this document retention period, Settling Defendants shall notify the United States at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendants shall deliver any such records or documents to EPA. If the United States has not responded to Settling Defendants' notice prior to the time Settling Defendants intend to destroy the records or documents, Settling Defendants shall deliver all such records and documents to EPA no earlier than ten (10) days after providing an additional written notice that such records and documents will be delivered, unless EPA provides otherwise after receiving such notice. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

142. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the Commonwealth or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section

104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

XXVI. Notices and Submissions

143. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, NPS, the Commonwealth, and the Settling Defendants, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-11-2-271m

Cynthia Nadolski
Senior Assistant Regional Counsel (3RC43)
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Charles Root
EPA Project Coordinator (3HS21)
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Pamela Underhill, Park Manager
Appalachian National Scenic Trail

National Park Service
Harpers Ferry Center (deliveries: Third Floor, Civil War Story Bldg.)
Harpers Ferry, WV 25425

Shawn P. Mulligan
Attorney Advisor
National Park Service
1050 Walnut Street, Suite 220
Boulder, CO 80302

As to the Commonwealth:

James Kunkle
Pennsylvania Department of Environmental Protection
Environmental Cleanup Program
Bethlehem District Office
4530 Bath Pike
Bethlehem, PA 18107-9074

As to the Settling Defendants:

For Viacom International Inc:

Jeffrey B. Groy, Esquire
Vice President
Viacom International Inc.
299 South Main Street
Suite 1800
Salt Lake City, Utah 84111-5233

For TCI Pacific Communications, Inc.

Thomas R. Nathan
Assistant Secretary
TCI Pacific Communications, Inc.
1500 Market Street
Philadelphia, PA 19102

and

Ronald M. Eddy, Esquire
Sherman & Howard L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202

For HII/HRDC:

Ali Alavi
Vice President and General Counsel

Horsehead Industries, Inc.
d/b/a Zinc Corporation of America
300 Frankfort Road
Monaca, PA 15061

and

Thomas Janeck
Senior Vice President of Environment,
Health & Safety
Horsehead Industries, Inc.
d/b/a Zinc Corporation of America
300 Frankfort Road
Monaca, PA 15061

XXVII. Effective Date

144. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by this Court, except as otherwise provided herein.

XXVIII. Retention of Jurisdiction

145. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) herein.

XXIX. Appendices

146. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A1” is the OU1 ROD.

“Appendix A2” is the OU2 ESD.

“Appendix A3” is the OU3 ROD.

“Appendix B1” is the List of Properties Subject to Notice Under Paragraph 11.a(2)

“Appendix B2” is the draft Stipulated Order

“Appendix C1” is the OU1 Remedial Design Work Plan (as revised in August 2000).

“Appendix C2” is the OU3 Remedial Design Work Plan (as revised in June 2003).

XXX. Community Relations

147. Settling Defendants shall propose to EPA their participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to Operable Unit 1, Operable Unit 2, and Operable Unit 3.

XXXI. Modification

148. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendants. All such modifications shall be made in writing.

149. Except as provided in Paragraph 17 (Modification of the OU1 Work Plans), Paragraph 24 (Modification of the OU2 Work Plans), and Paragraph 31 (Modification of the OU3 Work Plans), no material modifications shall be made to the OU1 Work Plans, OU2 Work Plans, or OU3 Work Plans without written notification to and written approval of the United States, Settling Defendants, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the Commonwealth with a reasonable opportunity to review and comment on the proposed modification.

Modifications to the OU1 Work Plans, OU2 Work Plans, or OU3 Work Plans that do not

materially alter that document, or material modifications to the OU1 Work Plans, OU2 Work Plans, or OU3 Work Plans that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(B)(ii), may be made by written agreement between EPA, after providing the Commonwealth with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

150. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXII. Judicial Approval and Opportunity for Public Comment

151. HII's and HRDC's entry into the settlement reflected in this Consent Decree shall be subject to the Bankruptcy Court's approval pursuant to 11 U.S.C. § 363 and Bankruptcy Rule 9019. HII and HRDC shall promptly move for Bankruptcy Court approval of their entry into this Consent Decree and shall present such evidence and legal argument as is reasonably necessary to obtain such approval.

152. This Consent Decree shall be lodged with this Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate.

153. If for any reason the Bankruptcy Court should decline to approve HII's and HRDC's entry into this Consent Decree in the form presented, or if this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

154. Upon the Bankruptcy Court's approval of HII's and HRDC's entry into this Consent Decree, the Settling Defendants consent to the entry of this Consent Decree by this Court without further notice. Settling Defendants further agree not to oppose entry of this Decree by this Court or to challenge any provision of this Decree, unless the United States has notified them in writing that the United States can no longer support entry of the Consent Decree based on facts or considerations which indicate that this Consent Decree is inappropriate, improper or inadequate.

XXXIII. Signatories/Service

155. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

156. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

157. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXXIV. Final Judgment

158. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement

embodied in the Consent Decree. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

159. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS __ DAY OF _____, 20__.

Honorable Edwin M. Kosik
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Horsehead Industries, Inc., et al., Civil Action No. 3:CV-98-0654, relating to the Palmerton Zinc Pile Superfund Site.

FOR THE UNITED STATES OF AMERICA

8.22.03

Date

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

9-23-03

Date

A. KENT MAYO
KIMBERLY J. SABO
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

THOMAS A. MARINO
United States Attorney
Middle District of Pennsylvania

9-23-03

Date

BRIAN D. SIMPSON
Assistant United States Attorney
Middle District of Pennsylvania
U.S. Department of Justice
Federal Courthouse Building
228 Walnut Street, Suite 220
Harrisburg, PA 17108
Bar ID: OH0071431

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Horsehead Industries, Inc., et al., Civil Action No. 3:CV-98-0654, relating to the Palmerton Zinc Pile Superfund Site.

9-16-03
Date

8/9/05
Date

9-08-03
Date

DONALD S. WELSH
Regional Administrator, Region III
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103-2029

WILLIAM C. EARLY
Regional Counsel, Region III
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103-2029

CYNTHIA J. NADOLSKI
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency,
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Horsehead Industries, Inc., et al., Civil Action No. 3:CV-98-0654, relating to the Palmerton Zinc Pile Superfund Site.

8/26/03
Date

CHARLES P. RAYNOR
Associate Solicitor
Division of Parks and Wildlife
Office of the Solicitor
U.S. Department of the Interior
1849 C Street NW, Room 6557
Washington, DC 20240

8/26/03
Date

FRAN P. MAINELLA
Director
U.S. National Park Service
1849 C Street NW, Room 3112
Washington, DC 20240

8/19/03
Date

SHAWN P. MULLIGAN
Attorney Advisor
U.S. National Park Service
1050 Walnut Street - Suite 220
Boulder, CO 80302

Subject to the approval of the Bankruptcy Court, THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Horsehead Industries, Inc., et al., Civil Action No. 3:CV-98-0654, relating to the Palmerton Zinc Pile Superfund Site.

FOR HORSEHEAD INDUSTRIES INC.

9/15/03
Date

Signature: _____
Name (print): RONALD J. STATLE
Title: EXEC. VICE PRESIDENT
Address: 3010 WESTCHESTER AVE.
PURCHASE, N.Y. 10577

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): THE CORPORATION TRUST COMPANY
Title: _____
Address: CORPORATION TRUST CENTER
1209 ORANGE STREET
WILMINGTON, DE 19801
Ph. Number: _____

Subject to the approval of the Bankruptcy Court, THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Horsehead Industries, Inc., et al., Civil Action No. 3:CV-98-0654, relating to the Palmerton Zinc Pile Superfund Site.

FOR HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.

Date 9/15/03

Signature: _____
Name (print): RINALD J. STATILE
Title: EXEC. VICE PRESIDENT
Address: 3010 WESTCHESTER AVE
PURCHASE, NY 10577

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): THE CORPORATION TRUST COMPANY
Title: _____
Address: CORPORATION TRUST CENTER
1209 ORANGE STREET
WILMINGTON, DE 19801
Ph. Number: _____

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Horsehead Industries, Inc., et al., Civil Action No. 3:CV-98-0654, relating to the Palmerton Zinc Pile Superfund Site.

FOR VIACOM INTERNATIONAL INC.

9-18-03
Date

Signature: _____
Name (print): Eric J. Sobczak
Title: V.P. & Assistant Secretary
Address: Viacom Inc.
11 Stanwix Street
Pittsburgh, PA 15222

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Jeffrey Groy
Title: V.P. & Senior Counsel
Address: 299 S. Main Street - Ste. 1800
Salt Lake City, UT 84111
Ph. Number: _____

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Horsehead Industries, Inc., et al., Civil Action No. 3:CV-98-0654, relating to the Palmerton Zinc Pile Superfund Site.

FOR TCI PACIFIC COMMUNICATIONS, INC.

Sept 18, 2003
Date

Signature: _____
Name (print): Abram E. Patlove ✓
Title: President
Address: 1201 Market Street
Suite 1405
Wilmington, DE 19801

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Comcast Capital Corp.
Title: _____
Address: 1201 Market Street
Suite 1405
Wilmington, DE 19801
Ph. Number: _____